Supreme Court, U.S.
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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the nexus analysis used by the Fifth Circuit Court of Appeals is appropriate to determine whether an action was taken under color of law pursuant to 42 U.S.C. §1983.

2. Whether the right to due process under the Fifth Amendment to the United States Constitution is violated in a damage suit prosecuted under 42 U.S.C. §1983, when, on the morning of trial, the District Court, without prior notice, reinstates long-since dismissed official capacity claims against a defendant, and then insists throughout trial that his attorneys, over their repeated objections that they cannot do so, represent the defendant in both his individual and official capacities, despite conflicts of interest between those two positions.

3. Whether a federal civil litigant is deprived of due process under the Fifth Amendment to the United States Constitution when the trial court shows bias and prejudice against the defendant that affected the outcome throughout the bench trial of the damage suit case.

4. Whether attorneys' fees and expenses awarded to Respondent impermissibly amounted to a windfall for Respondent.

PARTIES TO THE PROCEEDING

The Petitioner is Presley L. Pippin, Jr. The Respondent is Ellen Gail Bennett.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The names of all parties to the proceedings before the United States Court of Appeals for the Fifth Circuit are as follows:

(1) Presley L. Pippin, Jr., who is the Petitioner and who was Appellant in the Fifth Circuit.

(2) Ellen Gail Bennett, who is the Respondent and who was Appellee in the Fifth Circuit.

(3) Archer County, Texas, who is not a party to this proceeding but who was an Appellant in the Fifth Circuit by virtue of Petitioner being sued in his official capacity under 42 U.S.C. §1983.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BY OTHER COURTS IN THIS CASE

The opinions by other Courts in this case have either been published and reported in the official reports or are unpublished. These opinions are listed in the Appendix as set forth below:

(1) The opinion of the United States Court of Appeals for the Fifth Circuit. See, Ellen Gail Bennett, Plaintiff/Appellee v. Presley Pippin, Jr, Individually and as Sheriff of Archer County, in his official capacity (as Sheriff of Archer County, in his official capacity deleted as per Order dated 11/16/92 - leaving Presley Pippin Jr Individually as dft)(Presley Pippins Jr, [sic.] as Sheriff of Archer County, in his official capacity, reinstates as per oral order of Judge Joe Kendall during non-jury trial 2/10/95) Defendant/Appellant and Archer County, Texas, Movant/Appellant, No.

95-10380 (5th Cir., January 24, 1996, Opinion) [Appendix A]; Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996).

(2) The Opinion of the United States Court of Appeals for the Fifth Circuit on Petitioner for Rehearing. See, Ellen Gail Bennett, Plaintiff/Appellee v. Presley Pippin, Jr, Individually and as Sheriff of Archer County, in his official capacity (as Sheriff of Archer County, in his official capacity deleted as per Order dated 11/16/92 - leaving Presley Pippin Jr Individually as dft)(Presley Pippins Jr, [sic.] as Sheriff of Archer County, in his official capacity, reinstates as per oral order of Judge Joe Kendall during non-jury trial 2/10/95) Defendant/Appellant and Archer County, Texas, Movant/Appellant, No. 95-10380, (5th Cir. Unpublished Opinion, March 1, 1996) [Appendix B].

(3) The Order denying individual Defendant's Motion to Vacate Judgment, and for New Trial, United States District Court, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And In His Official Capacity As Archer County Sheriff, Civil Action Number 7:92-CV-98-X (N.D. Tex. April 3, 1995) [Appendix C].

(4) The Order modifying judgment, United States District Court, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And In His Official Capacity As Archer County Sheriff, Civil Action Number 7:92-CV-98-X (N.D. Tex. April 12, 1995) [Appendix D].

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(6) Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And As Sheriff For Archer County, Texas, In His Official Capacity, Civil Action Number 7:92-CV-098-X (N.D. Tex. February 27, 1995) [Appendix F].

(7) Order Awarding Attorneys' Fees And Expenses, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And As Sheriff Of Archer County, Texas, In His Official Capacity, Civil Action Number 7:92-CV-098-X (N.D. April 13, 1995) [Appendix G].

(8) Order Denying Archer County, Texas', Motion For A New Trial, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And In His Official Capacity As Archer County Sheriff, Civil Action Number 7:92-CV-98-X (N.D. Tex. April 3, 1995) [Appendix H].

(9) Order Denying Official Defendant's Motion for New Trial, United States District Court, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And In His Official Capac-

ity As Archer County Sheriff, Civil Action Number 7:92-CV-98-X (N.D. Tex. April 3, 1995) [Appendix I].

(10) Order Denying In Part And Granting In Part Defendant's Motion to Dismiss, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And As Sheriff Of Archer County, In His Official Capacity, Civil Action Number 7:92-CV-098-X (N.D. Tex. November 16, 1992) [Appendix J].

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on January 24, 1996. The Fifth Circuit denied a timely Petition For Rehearing on March 1, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are as follows:

> (1) "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

> or other proper proceeding for redress."

42 U.S.C. § 1983.

> (2) "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitutional Amendment V.

The jurisdiction of the District Court was invoked under the Federal Civil Rights Act, 42 U.S.C. §1983 and under 28 U.S.C. §1331 (general federal question jurisdiction).

STATEMENT OF THE CASE

On July 2, 1990, the Wichita Falls Police Department received a call from a woman, later identified as Ellen Gail Bennett,[1] stating that she had shot her ex-husband, Tony Bennett. (Tr. Vol. IV, PP. 190-191). After transporting Bennett to the Wichita Falls Police Department, the officers discovered that the shooting had actually occurred in Archer County, not Wichita County, Texas (Tr. Vol. IV, P. 199), thereby giving jurisdiction of the investigation to the Archer County, Texas, Sheriff's Department. Presley Pippin, Jr., Sheriff of Archer County,[2] radioed that he would come to Wichita Falls to take custody of Bennett. (Tr. I, 200-201, 217). At about 11:00 P.M., Pippin arrived in Wichita Falls. This was the first time he had seen Bennett. (Tr. II, 23, 25). Pippin read Bennett her Miranda warnings and questioned her about the shooting. (Tr. II, 32). Pippin explained to Bennett that he was not going to put her under arrest at that point, that an investigation would be conducted into the shooting, and that she would be afforded the opportunity to make a statement. (Tr. II, 35-36). Pippin then drove Bennett to the crime scene, where he turned her over to Deputy Sheriff Kurt Berryman. (Tr. II, 24). These events were Pippin's only official involvement in the investigation of the shooting. Enroute, Pippin stopped and purchased cigarettes for Bennett after she requested a cigarette, and Bennett touched Pippin in a familiar fashion. (Tr. V, 77).

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[1]Hereinafter also referred to as simply "Bennett" or "Respondent."

[2]Hereinafter also referred to as simply "Pippin," "Sheriff," or "Petitioner."

At no time was Bennett either handcuffed or placed under arrest.

Other deputies sheriff were at the scene of the shooting when Bennett and Pippin arrived. (Tr. V, 29). The Sheriff left soon thereafter, and Deputy Berryman, who was in charge of the investigation, drove Bennett to the Archer County Sheriff's Department, where she gave a statement. (Tr. V, 24, 39). Pippin was not present when Bennett gave her statement. (Tr. V, 39; IV, 209). The Sheriff later stopped by the hospital and determined that Tony Bennett's condition was stable (Tr. V, 24, 39-40). After checking on a grass fire in Archer County (Tr. V, 24, 40), Pippin decided to return to Bennett's home to check on her welfare, since she had earlier expressed concern that her ex-husband's friends or family might retaliate against her. (Tr. V, 43-44, 161). Here, the testimony of the parties diverges.

According to Bennett, Pippin was waiting for her in the driveway of her home and motioned for her to come into the driveway. (Tr. I, 115-116). She testified that Pippin led her to believe this questioning was part of the investigation and that she felt compelled to answer. (Tr. I, 117-119). According to Bennett, at some point during Pippin's questioning, Pippin touched her in a way that made her feel uncomfortable. Id. She says she told Pippin she was tired and would prefer to answer any further questions in the morning. (Tr. I, 120). She says they stood up, and Pippin walked off the porch; she walked back into the house; Pippin was in the front yard; and she went to bed. (Tr. I, 120-121). She testified that sometime later, she awoke to find Pippin standing over her bed, naked. (Tr. I, 123). Bennett testified that Pippin then

had sex with her, while she resisted. (Tr. I, 126-127). Bennett stated that during her resistance, Pippin said he could do whatever he wanted to do, that he was the Sheriff (Tr. I, 124-125) and further said, "What are you complaining about? I could have just thrown you in jail and sorted it out later." (Tr. I, 161).

According to Pippin, when he visited Bennett that evening, Bennett met him at the door and let him in. (Tr. V, 79). The two sat on the back porch and discussed personal matters and drank coffee. (Tr. V, 79-80, 146). While still on the back porch, Pippin helped Bennett remove her boots and then massaged her feet. (Tr. V, 82-83). According to Pippin, he suggested that they have sex, and the two adjourned to the bedroom. (Tr. V, 83). Once there, they engaged in light foreplay and kissing and had sex. (Tr. V, 122). Pippin then left the residence at approximately 4:00 A.M.

It is undisputed that the grand jury later no-billed Bennett for the charge of attempted murder of her husband, following which Bennett for the first time alleged that Pippin had sexually assaulted her. After hearing the testimony of both Bennett and Pippin, the grand jury later no-billed Pippin on Bennett's sexual assault allegation.

Bennett filed suit against Pippin, in his (1) individual capacity and in his (2) official capacity as Sheriff of Archer County, Texas, for civil rights violations pursuant to 42 U.S.C. §1983. Bennett alleged that the Sheriff, under color of law, sexually assaulted her while she was a suspect in a shooting case.

The United States District Court for the Northern District of Texas - Wichita Falls Division - on November 16, 1992, granted in part Pippin's motion to dismiss pursuant to Rule 12(b)(6) by dismissing all claims asserted against Pippin in his official capacity (R. 105-108)[3]. Over two years later and on the very morning of trial, February 10, 1995, a different Judge in the District Court vacated its prior Order and reinstated all official capacity claims against Pippin. (Tr. IV, 1-30)[4]. The case was tried to the bench on two successive Fridays, February 10 and 17, 1995. The District Court ruled from the bench at the close of trial on February 17, 1995, that Pippin was liable in his individual and official capacities (Tr. V, 200-203). The Court awarded actual damages in the amount of $1,000,000.00 and punitive damages in the amount of $1,000,000.00. (R. 494). Judgment was entered in Bennett's favor against Pippin in his individual and official capacities on February 27, 1995. The District Court later granted Plaintiff's motion for attorneys' fees and expenses, totaling $133,235.58. (R. 729). Archer County then moved to intervene, which the Court denied. (R. 552, 695). Both Archer County and Sheriff Pippin moved that the trial court vacate its Judgment and grant a new trial. (R. 531, 592). On April 3, 1995, these motions also were all denied. (R. 694, 696, 697).

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[3]"R" refers to the Record of the United States Court of Appeals, Fifth Circuit.

[4]"Tr." refers to the transcribed testimony of the bench trial, on record with the United States Court of Appeals for the Fifth Circuit.

On April 28, 1995, May 2, 1995, and May 5, 1995, Pippin timely filed his Notice of Appeal, First Amended Notice of Appeal and Second Amended Notice of Appeal from the Judgment of the District Court. The Opinion of the United States Court of Appeals for the Fifth Circuit was entered on January 24, 1996. See Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996). In that Opinion, the Fifth Circuit held that Pippin had acted under color of state law in violating Bennett's civil rights and was liable in his individual capacity to Bennett. However, the Fifth Circuit reversed as to Pippin in his official capacity or Archer County, finding that Archer County was deprived of its right to a jury trial when the District Court made it a defendant on the morning of trial. The Fifth Circuit denied a timely Petition for Rehearing on March 1, 1996.

REASONS FOR GRANTING THE WRIT

(A) "Color Of Law"

The Fifth Circuit in this case, based on its recent en banc decision in Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994) (en banc), cert. denied, Lankford v. Doe, 115 S.Ct. 70 (1994), held that (1) Pippin's actions, as a Sheriff of a Texas county, "were an abuse of power held uniquely because of a state position"; and (2) an "explicit invocation of governmental authority constituted a real nexus between the duties of Sheriff and the rape." Bennett v. Pippin, 74 F.3d 578, 589 (5th Cir. 1996). [Appendix A]. Relying on an erroneous interpretation of the Tenth Circuit's "nexus" test in D.T. By M.T. v. Independent School District No. 16, 894 F.2d 1176 (10th Cir. 1990), the Fifth Circuit's new standard for a finding of "color of law"

in a factual scenario involving a law enforcement officer is contrary to this Court's own precedent and has not been followed by any other circuit in the nation. In fact, the Fifth Circuit's standard is unique, having no basis in any prior opinions by any of the Circuits in the nation.

In any civil rights action under 42 U.S.C. §1983, a plaintiff has the burden to establish, among other things, proof of two indispensable elements: (1) that he or she was deprived of a right or interest secured by the Constitution and laws of the United States, and (2) that the deprivation occurred under "color of state law." West v. Akins, 487 U.S. 42, 48 (1988). While clear precedent exists for guidelines in determining whether a constitutional violation has occurred in a case, a specific standard for determining when an individual has acted under color of state law has been proven to be an elusive one. The concept was defined by the Court in two cases decided in the same decade. In United States v. Classic, 313 U.S. 299, 326 (1941), the Court held,

> "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law."

In Screws v. United States, 325 U.S. 91, 111 (1944), the Court affirmed the holding of Classic, but stressed that "under color of law" means "under pretense of law." The Court explained that, "Acts of police officers who undertake to perform their official duties are included whether they hew to the line of authority or overstep it." Id., at 111. However, "acts of officers in the ambit of their personal pursuits are plainly excluded." Id., at 111.

Until Doe v. Taylor, Id., the Fifth Circuit had steadfastly adhered to these guidelines for determinations of the color of state law element of §1983 causes of action against law enforcement officials. In Delcambre v. Delcambre, 635 F.2d 407 (5th Cir. 1981), the Fifth Circuit held that the defendant police officer was not acting under color of state law, and thus not liable under §1983, when he assaulted his sister-in-law on the premises of the municipal police station while on duty following an argument, during which the sister-in-law was neither arrested nor threatened with arrest. The Fifth Circuit in United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991), held that the defendant police officer acted under color of law for an assault of an individual in his home, because he used a service weapon; he identified himself as a police officer; he requested assistance from another officer whom he identified to the victim as a fellow officer; and he claimed special authority for his actions by virtue of his official status, all of which created an environment in which the "air of official authority pervaded the entire incident."

As shown by these pre-Doe Fifth Circuit cases, determination of the color of law elements for §1983 necessarily is a fact-intensive inquiry. In those situations where law enforcement officers engage in a purely-personal pursuit (like sex), no bright line exists in making the determination. The Second Circuit, in Pitchell v. Callan, 13 F.3d 545, 548 (2nd Cir. 1994), summarizes the problem:

> "However, while it is clear that 'personal pursuits' of police officers do not give rise to §1983 liability, there is no bright line test for dis-

> tinguishing 'personal pursuit' from activities taken under color of law."
>
> "More is required than a simple determination as to whether an officer was on or off duty when the challenged incident occurred . . . in short, courts look to the nature of the officer's act, not simply his duty status."

It is clear that the other Circuits in the nation are in agreement that the nature of the act performed is controlling in determining whether an officer, either on or off duty, is acting under color of law. United States v. Tarpley, Id.,; Revene v. Charles County Commissioners, 882 F.2d 870, 872 (4th Cir. 1989) ("the nature of the act performed is controlling"); Gibson v. Chicago, 910 F.2d 1510, 1517 (7th Cir. 1990) (". . . the essential inquiry becomes whether [the officer's] . . . actions related in some way to the performance of police duty"), and Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975), cert. granted, 425 U.S. 910, cert. dism'd., as improvidently granted, 429 U.S. 118 (1976) (holding that the nature of the actions performed controlled, and not the clothing of the actor or the status of being on-duty or off-duty). Analysis of the nature of the acts performed by the defendant law enforcement officer is necessary, because otherwise a §1983 action could lie against an entity for every intentional tort committed by an official who happened to be employed by that entity, a result that has been clearly rejected by the Court in Parratt v. Taylor, 451 U.S. 527, 544 (1981), wherein it was stated, in relevant part, that, "Such reasoning would make the Fourteenth Amendment a font of tort law to be superimposed upon what other systems may already be administered by the states."

See also, Baker v. McCollan, 443 U.S. 137, 146 (1979).

Beginning with Doe v. Taylor, Id., a case in which six Fifth Circuit Judges dissented regarding specifically the "color of state law" analysis of the majority, the Fifth Circuit adopted a new and unique standard for determining "color of state law", that was and is contrary to both Supreme Court precedent and the case law established by the other federal circuits. In Doe, the Fifth Circuit held that the defendant, a high school coach, violated 42 U.S.C. §1983 when he had a sexual relationship with a fifteen-year old student in his biology class. The Fifth Circuit, in holding that the defendant acted under color of law, relied significantly on D.T. By M.T. v. I.S.D. Id., when it stated:

> "As the Court in D.T. recognized, if a "real nexus" exists between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher, then the teacher's conduct is taken under color of state law . . ."

Doe, 15 F.3d at 442, f.n. 4.

Two glaring problems exist with the Fifth Circuit's reliance on D.T. First, the Fifth Circuit misconstrued the "real nexus" standard discussed in the Tenth Circuit's opinion. D.T. is a case in which a teacher molested three students during the summer while engaged in a fundraising campaign for a basketball camp. The school argued successfully that color of state law did not exist for the plaintiff's §1983 cause of action, because the fundraising activity was not a school program but rather was organized as a community volunteer effort. The

Tenth Circuit described the "real nexus" test as follows:

> "In other words, it is the obligation of the plaintiff to prove that there exists a direct nexus between the constitutional torts (here the acts of sexual molestation . . .) and the School District's authorization or approval thereof, either expressly or otherwise . . ."

D.T., 894 F.2d at 1187. Clearly, this test, requiring an authorization or approval by the governmental entity of the individual's acts made the basis of the lawsuit, is a much higher standard of proof than the Fifth Circuit's interpretation of it, requiring simply a connection between the alleged violation and the defendant's duties.

Second, a closer examination of the Fifth Circuit's "real nexus" test reflects that the Fifth Circuit is essentially embracing a standard for "color of state law" that requires very little connection between the alleged violation and the duties of the defendant official. The Fifth Circuit in Doe believed that the defendant there took advantage of his position as teacher and coach to seduce the student by giving her good grades, while requiring her to do little or no work and while urging one of the student's other teachers to raise her grade in another class. Further, the Fifth Circuit emphasized that physical contact with the student occurred, at times, on school grounds or after school events. 15 F.3d at 452, f.n. 4. Yet, as pointed out by the dissent, the only activity that was under color of law was when the defendant caused the student to develop a crush on him; the sexual abuse, was not under color of state law, because it came later, not

during school hours, not as part of a school activity, and not as a part of any exchange of favors between the defendant and the student. 15 F.3d at 468. The only "real nexus" for color of law in Doe was between the physical conduct made the basis of the lawsuit and the defendant-teacher's status simply as the student's teacher and coach.

In the present case, the Fifth Circuit, in line with Doe's "real nexus" test, based its holding that "color of state law" existed for Bennett's §1983 cause of action on four sets of the District Court's factual findings: (1) Pippin questioned Bennett about the earlier shooting for thirty to forty-five minutes as the two sat on her porch, just before the rape occurred; (2) In response to Bennett's refusal to have sex, Pippin said, "I can do what I want, I'm the Sheriff"; (3) Pippin used his authority as Sheriff to determine if Bennett's husband would be released from the hospital that same night; and (4) Bennett needed Pippin's permission to retrieve her pickup truck and to change her place of residence.[5] Further, the Fifth Circuit, in agreement with the District Court, commented,

> "It was not lost on Gail Bennett (or the Sheriff) that the Sheriff carried the keys to the Archer County Jail with him in his pocket . . ." (Id., at 589).

But for the Fifth Circuit's erroneous reliance on Doe's misinterpretation of the "real nexus" test, none of these factual findings, singularly or in combination,

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[5]The first two factual findings are from Bennett's testimony and are disputed by Petitioner. Bennett, 74 F.3d at 589.

would constitute "color of state law", as defined by Supreme Court precedent and the case law of the other Circuits.

First, the record evidence concerning the first finding by the Court is not that Pippin ever told Bennett that he was questioning her as part of an attempted murder investigation. Bennett's own testimony was that Pippin led her to believe this questioning was part of the investigation and that she felt compelled to answer. (Tr. I, 117-119). Yet, federal law is clear that a victim's objective reaction is irrelevant in determining whether an officer acted under color of law when performing an act. Pitchell, 13 F.3d at 548-49.

Second, Bennett's contention that Pippin stated he could do what he wanted - he was the sheriff - is insufficient to establish that Pippin had misused any of his duties as a sheriff. Remarks about an officer's status alone are insufficient to establish color of state law when the activity concerns only an officer's private pursuit. Varna v. City of Perth Amboy, 42 F.3d 809 (3rd Cir. 1994) (holding that two officers who assaulted an individual were not acting under color of law, since the incident was a personal dispute, irrespective of one officer's remark to the individual before the assault, "I'll show you jurisdiction.")

Fourth, according to Bennett's own testimony, deputies informed her that she should not leave Archer County without the permission of Pippin, subsequent to her arrest and well before the time when Pippin visited her at her home that night. (Tr. I, 113, 202-203). Her contention that Wichita Falls Police Department personnel told her they could not release her truck without the

Sheriff's permission was an event that allegedly occurred, according to Bennett's own testimony, the day after the Sheriff's evening visit to her home. Both alleged events are immaterial to the issue of whether Pippin acted under color of law when he had sex with Bennett at her ex-husband's house, on the previous evening.

Even accepting all other testimony of Bennett regarding the night in question as true for sake of argument only, the facts under pre-Doe cases and Supreme Court precedent do not establish the necessary element of "color of state law" for a cause of action under 42 U.S.C. §1983. According to Bennett herself, at some point during her conversation with Pippin that evening, she told Pippin she was tired and would prefer to answer any further questions in the morning. (Tr. I, 120). She testified that they stood up; Pippin walked off the porch and into the yard; and she walked back in the house and went to bed. (Tr. I, 120-121). According to Bennett, the next thing she remembered was that Pippin was standing over her in her bedroom without any clothes on. (Tr. I, 122-123). She contended Pippin had sex with her, while she was trying to stop him. (Tr. I, 124-125). That version by Bennett reflects no law enforcement activity as well as no "real nexus" between his law enforcement duties and any personal or private pursuit, of which sex is certainly one that can only be personal in nature.

Bennett's own testimony, if believed, would indicate that Pippin left her house that evening and subsequently re-entered without her knowledge or permission. Clearly, under Bennett's own view, Pippin would be violating Texas criminal law by unlawfully entering and then would be violating Texas criminal law by forced sex, in effect

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allegations of two separate felonies. The Fifth Circuit's holding that these alleged actions constituted color of state law is in direct conflict with this Court's own holding in Barney v. City Of New York, 193 U.S. 430, 437 (1904) that state action does not exist when the act complained of "was not only not authorized, but was forbidden by [state] legislation." See also, Doe, 15 F.3d at 481 (Garza J., dissenting). These alleged actions certainly do not show misuse of any power possessed by virtue of state law as required by Classic, but reflect, instead, under Bennett's own theory, actions by Pippin in his personal pursuit, which are excluded from color of state law. Screws, Id.

In sum, in this case, the Fifth Circuit erroneously relied on a simplistic "real nexus" test, announced by it first in Doe and originating from a misinterpretation of D.T., holding that color of state law existed based simply on Pippin's status as a Sheriff and the fact that the sex occurred at Bennett's home in the Sheriff's jurisdiction. Such an extremely weak and tenuous connection between the act made the basis of the lawsuit and the duties of Pippin is insufficient under §1983 for color of state law to exist. The Fifth Circuit now permits in Doe and in this case that very situation which this Court rejected in Parratt, whereby now §1983 actions may lie against an entity for every intentional tort allegedly committed by an official who happened to be employed by that entity. This type of unfair expansion of 42 U.S.C. §1983 should be struck down by this Court.

(B) Denial Of Due Process Regarding District Court's Order

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It is well established that civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause. Green v. Bock Laundry Machine Company, 490 U.S. 504 (1989). The purpose of the jury trial in federal civil cases is to assure a fair and equitable resolution of factual issues. Gasoline Products Co. v. Champlin Co., 283 U.S. 494 (1931).

In the present case, the Fifth Circuit deprived Pippin of due process by approving the District Court's reviving, on the very morning of trial, of claims against Pippin in his official capacity and insisting that Pippin's counsel proceed on behalf of Pippin in his official capacity, that is, on behalf of Archer County, Texas, at the same time that they already were representing Pippin in his individual capacity, all starting on the morning of the trial, itself. The District Court repeatedly insisted then and throughout trial that Pippin's counsel represented Pippin in both his individual and official capacities, despite which Pippin's counsel maintained they represented Pippin only in his individual capacity, while counsel for Pippin in his individual capacity pointed out the inevitable conflict in representing Pippin in both capacities, Bennett, 74 F.3d at 582 - a disqualifying conflict of the very type which the Fifth Circuit had decried fifteen years earlier in Van Ooteghen v. Gray, 628 F.2d 488 (5th Cir. 1980). Nevertheless, the District Court insisted otherwise. See, transcript of District Court's oral orders [Appendix K].

The Fifth Circuit approved the District Court's indiscriminate invasion of the attorney-client relationship when it forced Pippin's counsel to proceed ostensibly on behalf of Pippin in his official capacity,

which effectively forced Pippin's lawyers simultaneously to represent Archer County, with all of the inevitable and continual distractions which inevitably imposed on counsel in their having to evaluate every question, every answer, every objection, every argument, every witness, every item of evidence, and every position not only as it impacts the representation of one party but also and overwhelmingly as it impacts each of the two parties separately and whose interests are inconsistent and whose liability positions are not always aligned - the very dilemma which the Fifth Circuit long ago decried in Van Ooteghen v. Gray, Id., and the very dilemma which necessarily makes effective representation of two parties with competing interests by the same lawyers impossible.

The parameters of the attorney-client relationship are governed by state law. Hopper v. Frank, 16 F.3d 92, 95 (5th Cir. 1994). Under Texas law, the matter is one of contract, which requires that there be a meeting of the minds. Terrell v. State, 891 S.W.2d 307 (Tex.App.--El Paso 1994, writ ref'd.); Yakin v. Glusing, Sharpe & Kruger, 875 S.W.2d 381 (Tex.App.--Corpus Christi 1994, no writ). Since Pippin's counsel were unable to confer with Archer County, such a meeting of the minds was impossible. In fact, when the County Commissioners were able to consider and vote on the matter, they unambiguously decided that Mr. Ludlum's joint representation of the County and Pippin was not in the County's best interest. (R. 584-591). The District Court had no authority to interfere in the relationship between Mr. Ludlum and his client. Brooks v. State, 854 S.W.2d 659 (Tex.App.--Dallas 1992, no writ).

As the Fifth Circuit noted in Van Ooteghen v. Gray, Id., one practical effect of Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) (holding that a local governmental unit is a "person" for the purposes of 42 U.S.C. §1983) is that a conflict arises from a single attorney's representation of a government official in all capacities. 628 F.2d at 495, f.n. 7. Despite Mr. Ludlum's repeated objections, the District Court ignored the obvious and blatant conflict and forced the parties to trial, potentially requiring defense counsel to violate their ethical obligation to avoid conflicts of interest that inevitably compromise the interests of both "represented" parties. Requiring defense counsel to represent Pippin in all capacities would have prevented counsel from a free and unfettered defense of both Pippin and Archer County. In short, the District Court placed defense counsel in an untenable and impossible position, abrogating Pippin's due process right to a fair trial.

A reversal and a remand for a new trial of the claims asserted against Pippin in his official capacity (and, hence, Archer County) does absolutely nothing whatsoever to cure the compromise of the full, free, unfettered and fully-effective representation to which Pippin was and is entitled and of which he, thus far, has been judicially deprived - contrary to every notion of sound ethics and due process of law.

(C) Denial Of Due Process Regarding District Court's Comments

As stated, civil litigants in federal court can expect the protections of the due process clause of the Fifth Amendment. Green, Id.

A basic tenet of American jurisprudence is that a defendant is entitled to a fair and impartial fact finder, whether it be the jury or the bench. Montiel v. City Of Los Angeles, 2 F.3d 335 (9th Cir. 1993). A litigant is entitled to a trial before a judge "not biased against him at any point of the trial." United States v. Holland, 655 F.2d 44, 47 (5th Cir., Unit B, 1981), quoting United States v. Thompson, 483 F.2d 527, 529 (3rd Cir. 1973). Such, of necessity, means a decision formed on the basis of the evidence, not a predisposition about the case or about either party.

In the case at bar, the Fifth Circuit deprived Pippin of due process by refusing to reverse the judgment of the District Court, although the District Court clearly demonstrated throughout the trial of the case his strong bias personally against Pippin and in favor of Bennett, as the record amply demonstrates. This bias was evidenced by the District Court's slant in its active involvement in questioning the witnesses, rephrasing questions, interrupting examination of witnesses, and sidebar comments.

For example, when defense counsel inquired of Bennett concerning her own misguided purpose and motive of currying favor with Pippin as part of her own strategy to avoid being charged with or indicted for shooting her ex-husband, "Isn't it true that you were in fact buying some insurance to be sure that you had someone on your side in Archer County while the investigation was ongoing?" (Tr. Vol. IV, P. 182), the District Court interrupted cross-examination and asked Bennett if she had "bribed the Sheriff with sex?" (Tr. Vol. IV, P. 182). The District Court's gross misstatement of counsel's cross-examination reflects the

District Court's early predisposition against Pippin, and it undermined the effectiveness of cross-examination by potentially scaring the witness off from answering the more innocuous question that she was actually asked.

The District Court's bias arose possibly from his unknown experience as a police officer with the Dallas Police Department, a large urban organization. This bias surfaced early in the trial, when the Court reassured Bennett's counsel, "I don't need to listen to this. Trust me. You don't know me, but this is not the first time I had to make a call on who to believe or not." (Tr. Vol. IV, PP. 73-74). The trial judge was also suspicious of Pippin going to the scene of the shooting even though he was not the investigating officer. (Tr. Vol. IV, PP. 220). Finally, the District Court emphasized his law enforcement experience at the close of trial:

> [T]he judgment I'm going to render I render not merely as a federal judge .... It's not that I'm totally ignorant of law enforcement officers, because for five and a half years in my young life, I was one. That was the first job I ever had was a Dallas police officer, so I have arrested and investigated calls before, and I think I have a fairly good feel for -- more so than many sitting in my position, of what sheriffs and law enforcement officers go through. (Tr. Vol. V, PP. 200-201).

Apparently, Judge Kendall drew on his own experience in urban law enforcement, rather than impartially considering the evidence

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and testimony regarding a small rural sheriff's department employing only six deputies, or just his own notions from his own experience. (Tr. Vol. IV, PP. 219). Most importantly, the District Court allowed his own experience as an urban police officer to cloud his impartiality, preventing Pippin from receiving a fair trial.

This predisposition was reinforced at the close of trial, when the District Court repeatedly referred to the proceedings as a TV movie, "The Return To Macon County." (Tr. Vol. V, PP. 197-202). The District Court also quipped, "This docket is not a boring one." (Tr. Vol. V, P. 176). Similarly, the District Court actively cross-examined defense witness Etta Payton, questioning her veracity on the stand, in sharp contrast to the District Court's comparatively-mild inquiries of Bennett and other witnesses called by her counsel. Perhaps the most flagrant example of the District Court's prejudice is the District Court's statement, "About all I can say is I've been to three goat ropings at [sic] the County Fair and I don't think I've ever seen a deal like this one." (Tr. Vol. V, P. 200).

If, on the other hand, the District Court was meaning, as the Fifth Circuit suggested in divining the mental processes of the trial judge, to quip, during trial, then the result of such misplaced conduct leads to the same conclusion: Pippin was denied a fair and impartial trial. Not only were the "quips" of the trial court not directed to some innocuous bit of testimony or evidence, but also and moreover they were directed to the whole case. Litigation is serious and litigants have rights, starting with the right to a fair and impartial trial. Humor is necessary. It has its many proper places. The courtroom in circum-

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stances like these is certainly not one of them, but the "quips" were revealing in their own right in exposing judicial predisposition in this case, as the humor was not neutral. Moreover, Pippin is entitled - at least - to a fair trial, rather than one like the very untypical conduct of the trial court in this case.

The foregoing comments and the conduct of the Court during examination of witnesses were unnecessary but on the record, do, nevertheless, clearly reflect the District Court's predisposition, bias and prejudice against Pippin, which precluded Pippin from receiving a fair trial throughout and further deprived him in all capacities of due process of law. See, Liteky v. United States, 127 L.Ed.2d 474 (1994).

(D) Attorneys' Fees And Expenses Awarded To Respondent Improperly Calculated

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, authorizes District Courts to award reasonable attorney's fees to prevailing parties in §1983 cases. The Act's intent was for fee awards to not produce windfalls to attorneys. Riverside v. Rivera, 477 U.S. 561 (1986). The standards for awarding fees under §1988 are tied directly to Fifth Circuit precedent. As stated by the Court in Riverside,

> "While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying §1988 expressly endorsed the analysis set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)."

477 U.S. at 567. Johnson identifies twelve factors to be considered in calculating a reasonable attorney's fee. 488 F.2d at 717-719.

The Fifth Circuit has condensed the Johnson factors to a four-part framework first enunciated in Copper Liquor, Inc. v. Adolph Coors, 684 F.2d 1087, 1092 (5th Cir. 1982):

> (1) Ascertain the nature and extent of the services supplied by the attorney;
>
> (2) Value of the service according to the customary fee and quality of the legal work; and
>
> (3) Adjust the compensation on the basis of the other Johnson factors that may be of significance in the particular case. Nisby v. Commissioners Court of Jefferson County, 798 F.2d 134, 136 (5th Cir. 1986), quoting Copper Liquor.

A District Court must consider all the Johnson factors in making an attorney's fee award. Cobb v. Miller, 818 F.2d 1227, 1232 (5th Cir. 1987). In the case at bar, the Fifth Circuit's Opinion contravenes both Riverside, and Copper Liquor by refusing to reverse the District Court's award of attorneys' fees and expenses when the District Court failed to set forth the grounds for its fee award, falling far short of the standards.

The initial determination in considering an application for attorney's fees under §1988 is to multiply the reasonable time expended on the case by a reasonable hourly

rate. This results in a "lodestar". The lodestar may then be adjusted in light of other relevant Johnson factors. Cobb, 818 F.2d at 1231.

In her motion for attorney's fees, Bennett did not fully address the Johnson factors and did not provide adequate information to allow the Court to determine the lodestar. For example, neither Mr. Tuddenham nor Mr. Kolker, counsel for Bennett, gave any opinion as to the difficulty of the case, the success achieved, the "undesirability" of the case, the nature and length of their professional relationship with Bennett, awards in similar cases, and the time limitations imposed. In addition, neither attorney addressed whether he was precluded from accepting other cases because of his participation in this case. Finally, while Bennett's counsel included information regarding other contested fee awards, they did not state whether these fee awards were in civil rights cases.

Bennett's counsel claimed to have incurred a combined total of 552.94 hours for their time and 37.3 hours for their paralegals' time. Bennett requested an award of an hourly rate of $225 per hour for attorneys' time expended and $50 per hour for the paralegals' time expended. Not only is the hourly rate exorbitant, but Bennett's counsel inflated their fees after trial. (R. 708, 718). Further, Bennett's counsel spent far in excess of a reasonable amount of time in the preparation and prosecution of this case.

Bennett's counsel claimed to have extensive experience in civil rights cases, thereby justifying their hourly rate of $225.00. However, in this case, Bennett's counsel expended 43.25 hours in legal re-

search concerning claims asserted against Pippin. These charges are both unreasonable and exorbitant, especially in light of Mr. Tuddenham's and Mr. Kolker's alleged experience in civil rights cases.

Of the total research time, 32.5 hours was expended by law clerks. Yet, nowhere in the documentation provided by Plaintiff's counsel is the nature of this significant amount of research specified. Rather, Plaintiff seeks recovery for a single block of thirty hours of time.

In fact, all of the foregoing factors indicate that a downward adjustment of the lodestar amount is appropriate. First, the case is not factually difficult, consisting of a single incident which was tried to the bench in two days. The Fifth Circuit considered this factor in Blanchard v. Bergeron, 893 F.2d 87 (5th Cir. 1990) in deciding that the plaintiff's request for over 385 hours of legal time for a case consuming less than three days of trial, that was not legally or factually difficult, and which included only two defendants by the time the case reached trial, was not a reasonable expenditure of time. The Blanchard Court also noted that the plaintiff requested four times as much as the defense counsel charged for the case.

The case at bar presented a similar scenario since the case was tried in two days and involved only two individual defendants. The case could have been prepared much more efficiently. The fees awarded amounted to a windfall.

Finally, any award of attorney's fees under Section 1988 is addressed to the Court's sound discretion. Lewis v. Kendrick, 944 F.2d 949, 954 (1st Cir. 1991).

There is no requirement that the Court award all the fees requested by the plaintiff, or indeed, that the Court award any part of the fees requested. In light of the fact that Bennett's request for attorney's fees did not include several factors considered relevant and necessary by the Johnson Court, the Court should vacate the District Court's award of attorneys' fees.

The Fifth Circuit's Opinion refusing to vacate the District Court's award of attorneys' fees should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted and the judgments of the Fifth Circuit and the district court, as to Pippin in his individual capacity, should be reversed and a new trial granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 951944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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122 pp

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APPENDIX TO
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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-10380

ELLEN GAIL BENNETT

Plaintiff-Appellee,

versus

PRESLEY PIPPIN, JR., Individually and as Sheriff of Archer County, in his official capacity (as Sheriff of Archer County, in his official capacity deleted as per Order dated 11/16/92 - leaving Presley Pippin, Jr. Individually as dft) (Presley Pippin, Jr., as Sheriff of Archer County, in his official capacity, reinstates as per oral order of Judge Joe Kendall during non-jury trial 2/10/95)

Defendant-Appellant,

and

ARCHER COUNTY TEXAS,

Movant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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Before REAVLEY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges. HIGGINBOTHAM, Circuit Judge:

In this case, a Texas sheriff and a county appeal a judgment awarding damages to a murder suspect that the sheriff raped. We affirm the award against the sheriff individually, reverse the judgment against

the county, and remand for a new trial.

I

We describe the pre-trial proceeding in some detail, given the unusual procedural posture that this case has reached. In a complaint filed in June of 1992, Ellen Bennett sued Presley Pippin in the Western District of Texas under 42 U.S.C. § 1983 and Texas common law and demanded trial by jury. The complaint named Pippin in his individual capacity and in his official capacity as Sheriff of Archer County, Texas. It alleged that the Sheriff raped Bennett in the course of a homicide investigation. It further alleged that the Sheriff was "the final policy maker for the county for matters of law enforcement" and that the Sheriff's acts were "the official policy and/or custom of Archer County, Texas."

Three weeks later, attorney William K. Krueger, III, of the law firm of Ludlum & Ludlum, filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on behalf of the Sheriff individually and in his official capacity. A colloquy between defense counsel and the court at the eventual trial established that the Sheriff and Archer County had agreed initially that Krueger would represent them both at least through the filing of motions and that any conflict of interest in that joint representation would be waived.

The case was transferred to the Northern District of Texas and initially assigned to Judge Belew. Judge Belew denied all motions except the motion to dismiss with regard to the Sheriff in his official capacity. Referring to this court's heightened pleading standard for claims under section 1982, Judge Belew held that the complaint failed to state facts sufficient to allow a court to find that the Sheriff's alleged rape was pursuant to a

policy or custom of Archer County as required by Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978). Judge Belew reasoned that a single, isolated incident could not constitute a policy under Monell.

Shortly after discovery began with problems of insurance coverage in the background, Krueger and Ludlum & Ludlum withdrew as the attorney for the Sheriff and the Sheriff's personal attorney appeared for him. After various continuances and further discovery, Judge Belew granted leave to James Ludlum, also of Ludlum & Ludlum, to replace the Sheriff's personal counsel. Ludlum then moved to reopen discovery on behalf of "Presley Pippin, Jr., Individually and as Sheriff of Archer County, Texas, in his Official Capacity." As we will explain, however, Archer County was not at this time a party and no one thought that they were.

Five days before trial was to have begun, the court entered an order, agreed to by the parties, that the case proceed to arbitration under 28 U.S.C. §§651-58. The order stated that the parties waived their rights to a jury trial if either requested a trial de novo under 28 U.S.C. § 655. The arbitration panel returned an award against "Defendant, PRESLEY L. PIPPIN, JR." Pippin requested a trial de novo under section 655. There was no mention of Archer County. By this time, a portion of Judge Belew's docket had been assigned to Judge Kendall, who set for trial on Friday, February 10, 1995.

On the morning of February 10, Judge Kendall began the proceedings by announcing his inclination to reconsider the 12(b)(6) dismissal of Archer County. Judge Kendall stated that Judge Belew's dismissal had been based upon this circuit's heightened pleading standard for section 1983 cases, and that the Supreme Court had held that

standard could not be applied to a claim against a county Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993). Judge Kendall then asked the parties for comment on his proposed course of action. Ludlum conceded that the court was correct regarding the effect of Leatherman upon the case but stated that he had an ethical obligation to inform Archer County that it was now potentially liable for a damage judgment. Ludlum further stated that the interests of the Sheriff individually and the County might conflict on the issue of Monell policy or custom. Ludlum also stated on several times that he was representing the Sheriff only in an individual capacity. Ludlum suggested that the court continue the case for a week to allow the County time to consider whether it wanted a separate attorney.

Judge Kendall responded by expressing a desire to begin testimony that morning. While agreeing that a conflict of interest was possible in this type of lawsuit, the court saw no possibility that such a conflict would arise because the defense's pretrial filings had announced an intention to defend on the grounds that the sexual intercourse between Bennett and Pippin had occurred outside the scope of Pippin's duties as Sheriff. Finally, Judge Kendall concluded that Ludlum did represent both the Sheriff and Archer County, highlighting that Ludlum & Ludlum had initially filed the 12(b)(6) motion on behalf of the Sheriff individually and in his official capacity.[1]

After this exchange, Judge Kendall made

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[1]The colloquy on this latter point was extended. Ludlum repeatedly stated that he represented only the Sheriff individually, and the district court repeatedly disagreed.

the following rulings from the bench. First, he stated that the plaintiff would begin her case that day. Second, he would grant a 30 minute recess to allow Ludlum to notify Archer County officials of the reinstatement of the lawsuit against the Sheriff in his official capacity. Third, the judge stated that, because this was a bench trial, he would continue the case, reopen discovery, and recall witnesses for later cross-examination, should the County wish to do so. The judge reemphasized that the trial was to the court, and that he could be flexible as a result, but that trial would begin that morning.

The district court then granted a recess.[2] When Ludlum returned from the recess, the trial commenced. Testimony from various witness established the following undisputed facts. Ms. Bennett shot her husband in the chest after a violent domestic dispute in which Mr. Bennett had ripped the phone out of the wall, assaulted Ms. Bennett, then pointed a gun at her. At the time, the Bennetts were renting a house in Archer County. Ms. Bennett drove her pickup truck to a nearby convenience store located across the county line in Wichita Falls and called the Wichita Falls authorities. The Wichita Falls authorities arrested and handcuffed Ms. Bennett at the store, impounded the pickup truck, and notified the Archer County Sheriff's Office of the incident. Sheriff Pippin radioed Wichita Falls and instructed them to hold Ms. Bennett until he arrived to take custody of her.

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[2]At oral argument to this court, Archer County conceded that the County Judge and Attorney came to the courthouse and sat in the audience section of the courtroom to observe much of the trial, which took place on the afternoons of February 10 and 17.

After retrieving Ms. Bennett from Wichita Falls, the Sheriff drove her back to the house. By this time, Archer County Deputy Sheriffs had arrived to secure the scene and to take Mr. Bennett to the hospital. After receiving a tour of the site from a Deputy, the Sheriff left to attend to a brush fire. A Deputy Sheriff drove Ms. Bennett to the Archer County Sheriff's Office, where she was fingerprinted, photographed, and given Miranda warnings. After Ms. Bennett described Mr. Bennett's assault and the subsequent shooting to the Deputy, she signed a statement. The Deputy asked Ms. Bennett not to leave the County without the authorization of the Sheriff's Office and drove her home. Ms. Bennett then left briefly in her husband's truck to find a phone to call a friend in Austin for consolation.

The Sheriff, in the meantime, attended to the brush fire, then traveled to the hospital and learned that Mr. Bennett would not be released from the hospital that evening. He returned to the Bennett household, found no one there, and sat on the porch until Ms. Bennett returned. The Sheriff testified that he had at least two reasons for returning to the house. The first was that he wanted to assuage Ms. Bennett's previously expressed concern that Mr. Bennett's friends would attack her as a result of the shooting. The second was that he was mildly aroused by the manner in which Ms. Bennett had touched him as he lit a cigarette for her during the drive from Wichita Falls to her house. At the time of his return to the house, the Sheriff was wearing his badge and gun.

At this point, the testimony of Ms. Bennett and the Sheriff diverged. According to Ms. Bennett, when she returned to the house, the two sat on the porch drinking

coffee while the Sheriff questioned her about the shooting incident. After a while, the Sheriff touched her on the leg in a way that made her feel uncomfortable. In response, Ms. Bennett stated that she was tired and that she wished to answer any more questions the next day. Ms. Bennett saw the Sheriff off the porch, then went upstairs to bed and fell asleep. She awoke to find the Sheriff standing naked over her and attempting to remove her clothes. When she protested, the Sheriff responded that he was the sheriff and could therefore do what he pleased. When she persisted in objecting, the Sheriff stated, "What are you complaining about? I could have thrown you in jail and sorted it out later." The Sheriff then raped Ms. Bennett. Afterwards, the Sheriff ordered her to take a shower and not to tell anyone of the incident.

According to the Sheriff, Ms. Bennett returned shortly after his arrival at the house, and the two sat on the porch discussing their backgrounds and the difficulties in both of their marriages. The shooting that had occurred a few hours earlier did not happen to come up in conversation. After a while, the Sheriff helped Ms. Bennett remove her boots. The Sheriff then said, "Why don't we go get on the bed?" After Ms. Bennett put up what the Sheriff in a grand jury proceeding called "token verbal resistance," the two went into the house and had sex. At no point did the Sheriff threaten Ms. Bennett or otherwise coerce her.

Two days later, after receiving the Sheriff's permission to retrieve her pickup truck and to move her residence, Ms. Bennett left Archer County for Austin. She was subsequently no-billed by an Archer County grand jury. She reported the rape to the Austin authorities, and the Texas Rangers arrested the Sheriff. An Archer County

grant jury, nine members of which the Sheriff knew by name, subsequently no-billed the Sheriff.

At the close of the evidence, the district court ruled for the plaintiff from the bench and later filed written findings of fact and conclusions of law. The court found that the Sheriff raped Ms. Bennett in the manner described in her testimony, and that in doing so the Sheriff deprived Ms. Bennett of her substantive due process right to bodily integrity. It held that the rape was under color of state law and that, because the Sheriff was the final policy maker of Archer County under Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986), the County was liable for the rape. The court also found that the Sheriff's actions violated state tort law. The court then awarded one million dollars in compensatory damages and an equal amount in punitive damages and held the County jointly and severally liable for the compensatory damages. The court also awarded attorneys' fees and prejudgment interest.

After the court issued its findings of fact and conclusions of law, Archer County moved to intervene and for a new trial. The Sheriff individually and in his official capacity also moved for a new trial. The court denied these motions.

In this appeal, Archer County argues that the district court's reinstatement of the official capacity suit on the morning of trial violated its due process rights to notice, opportunity to be heard, and legal representation. The County also argues that the reinstatement violated the County's right to a trial by jury, and that the district court abused its discretion in denying its motion to intervene. Next, the County contends that the district court erred in holding it liable under state tort

law. Further, the County claims that the district court erroneously held that the Sheriff's actions were under color of state law and constituted the policy or custom of Archer County. Finally, the County contends that the original 12(b)(6) dismissal of the complaint as to the Sheriff in his official capacity was correct, and asks us to reverse the reinstatement order and render judgment in its favor.

In a separate brief, the Sheriff repeats many of the arguments that the County makes and essentially argues that the County has been treated unfairly. It also argues that the district court's finding that the Ms. Bennett did not consent to sex was clearly erroneous, that the district court erred in certain evidentiary rulings, that the Judge was biased, and that the award of attorneys' fees was too high.

II

We pause to dispel one source of confusion that persists in this litigation. Under Hafer v. Melo, 112 S. Ct. 358 (1991), Ms. Bennett's suit against the Sheriff in his official capacity is a suit against Archer County directly in everything but name. When a plaintiff sues a county or municipal official in her official capacity, the county or municipality is liable for the resulting judgment and, accordingly, may control the litigation on behalf of the officer in her official capacity. A suit against the Sheriff in his official capacity is a suit against the County. When Ms. Bennett sued the Sheriff in his individual and official capacity, she sued two defendants: the Sheriff and the County. As their briefs illustrate, the defendants have apparently considered this litigation as involving three parties: (1) the Sheriff individually; (2) the Sheriff in his official capacity; and (3) the County. The

defendants have apparently equated the interests of the Sheriff individually with the interests of the Sheriff officially. Under Hafer, such is not the case. We will refer to Ms. Bennett's suit against the Sheriff in his official capacity as a suit against Archer County.

It follows that Archer County's contention that the district court erred in denying its post-trial motion to intervene is without merit. When the district court reinstated the suit against the Sheriff in his official capacity, the County again became a party to this lawsuit. At the risk of stating the obvious, one already a party to a lawsuit may not, at least it certainly need not, intervene in the same lawsuit. We affirm the district court's denial of the County's motion to intervene.

III

The County contends that we should reverse and render judgment in its favor because the complaint failed to state sufficient facts to support a cause of action and because Ms. Bennett failed to prove at trial that the Sheriff's rape constituted the County's policy or custom under Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978). We find neither of the County's arguments persuasive.[3]

A

The County argues that the complaint

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[3]We reach these arguments in spite of the fact that, as we will explain, we reverse the judgment against the County and remand for a new trial because the County has asked us to reverse and render judgment in its favor on these two grounds.

failed to allege facts sufficient to support a claim against it. We refuse to reach this issue.

The reinstatement order was functionally identical to a denial of a motion to dismiss, and this effective refusal to grant a 12(b)(6) dismissal was followed by a final judgment after a trial on the merits. After a trial on the merits, the sufficiency of the allegations in the complaint is irrelevant. A district court must deny a motion to dismiss under Rule 12(b)(6) unless the complaint fails to state any set of facts upon which relief could be granted. Conley v. Gibson, 355 U.S. 41, 45-47 (1957). Rule 12(b)(6) measures the sufficiency of the plaintiff's allegations. When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) dismissal becomes moot. The plaintiff has proved, not merely alleged, facts sufficient to support relief. Any pleading defect may be cured by a motion under Fed. R. Civ. P. 15(b), and the sufficiency of the plaintiff's evidence may be tested by an appeal on that issue.

At least seven circuits hold that "denial of summary judgment is not properly reviewable on an appeal from a final judgment entered after trial." Whalen v. Unit Rig. Inc., 974 F.2d 1248, 1250 (10th Cir. 1992) (collecting cases), cert. denied, 113 S. Ct. 1417 (1993); accord, Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp., 51 F.3d 1229, 1234-37 (4th Cir. 1995); Watson v. Amedco Steel, Inc., 29 F.3d 274, 277 (7th Cir. 1994). The arguments for not considering an appeal from a denial of a Rule 12(b)(6) dismissal after a trial on the merits are stronger than those for not considering a refusal to dismiss under Rule 56, given the ease with which a plaintiff may amend a complaint after judgment in order to conform to the

evidence. See Fed. R. Civ. P. 15(b).[4]

Citing Monell v. Department of Social Services, 436 U.S. 658, 688-91 (1978), the County argues that the district court erroneously held it jointly and severally liable for Sheriff Pippin's rape because the Sheriff's actions did not constitute a policy of the County. The County contends that the Sheriff's actions could not be County policy because they violated well-established County policy.

Our cases make clear that under Monell, "a single decision may create municipal liability if that decision were made by a final policymaker responsible for that activity." Brown v. Bryan County, Oklahoma, 67 F.3d 1174, 1183 (5th Cir. 1995) (emphasis in original); see also City of St. Louis v. Praprotnik, 485 U.S. 112, 124-25 (1988); Turner v. Upton County, Texas, 915 F.2d 133, 136-37 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991). When a final policy maker makes the relevant decision, and that decision is within the sphere of the policy maker's final authority, "the existence of a well-established, officially-adopted policy will not insulate the municipality from liability where a policymaker herself

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[4]There is dictum stating that appellate courts should hear such appeals in Wilson v. First Houston Investment Corp., 566 F.2d 1235, 1238 (5th Cir. 1978) (quoting Charles A. Wright et. al., Federal Practice & Procedure § 1476, at 560 (2d ed. 1990)), vacated, 444 U.S. 959 (1979). This dictum takes place in the discussion of the different question of whether filing an amended complaint after an initial Rule 12(b)(6) dismissal waives the right to appeal the dismissal after final judgment. We are not bound by this dictum and refuse to follow it in this case.

departs from these formal rules." Gonzales v. Ysleta Independent School District, 996 F.2d 745, 754 (5th Cir. 1993). State law determines whether a particular individual is a county or municipality final decision maker with respect to a certain sphere of activity. Praprotnik, 485 U.S. at 124; Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989); Doe v. Rains County Independent School District, 66 F.3d 1402, 1407 (5th Cir. 1995).

In this circuit, "[i]t has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of the delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected." 915 F.2d 136 (citing and quoting from Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980)).[5] The Turner court held a county liable for the actions of its sheriff in planting evidence and conspiring to force the plaintiff to plead guilty of the resulting charges, concluding that "[w]hen the official representing the ultimate repository of law enforcement power in the county makes a deliberate decision to abuse that power to the detriment of its citizens, county liability under section 1983 must attach, provided that the other prerequisites for finding liability under that section are satisfied." 915 F.2d at 138.

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[5]The Sheriff's role in the County makes irrelevant the County's argument that no County official other than the Sheriff knew of the Sheriff's intention to rape Bennett. Under the Archer County power structure, no one had state law authority to contest the Sheriff's use of his power to place himself in a position to rape Bennett.

In this case, the Sheriff's actions were those of the County because his relationship with Bennett grew out of the attempted murder investigation and because, as we will explain, he used his authority over the investigation to coerce sex with her. The fact that rape is not a legitimate law enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function. See Turner, 915 F.2d at 137-38 (holding a Texas county sheriff liable for planting evidence, presumably not a legitimate law enforcement goal).

IV

Certain of the County's other arguments are more persuasive. In particular, the County was denied its right to a jury trial, and we therefore reverse the judgment against it and remand for a new trial.

Under Fed. R. Civ. P. 54(b), the district court had the power to reconsider and reverse its prior 12(b)(6) dismissal of the claims against the Sheriff in his official capacity. Rule 54(b) provides that, in the absence of an express entry of judgment with regard to a dismissed party, a 12(b)(6) dismissal does not "terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." In this case, however, the precipitous manner in which the district court proceeded after its reversal denied the County its right to a jury trial.

The complaint included a demand for a jury trial. Under Fed. R. Civ. P. 38(d), the County could rely on that demand, and Ms. Bennett could not withdraw it without the consent of all parties subject to trial on the merits, including the County. See

Pinemont Bank v. Belk, 722 F.2d 232, 235 (5th Cir. 1984). When the district court reinstated the County on the morning of trial, the County returned to the case with its right to a jury trial. The district court, however, proceeded with a bench trial an hour after reinstating the County.

Ms. Bennett contends that the County waived its right to a jury trial first, by agreeing to an arbitration conditioned upon a waiver of a jury trial, and second, by proceeding with the bench trial. Regarding the second alleged waiver, Ms. Bennett points out that the County Judge and Prosecutor were spectators to the bench trial knowing that the district court thought that the County had consented to a bench trial with Ludlum & Ludlum as the County's attorney. Ms. Bennett relies on Casperone v. Landmark Oil & Gas Corp., 819 F.2d 112, 116 (5th Cir. 1987), in which we held that a party's participation in a bench trial without objection waived its previously established right to a jury trial.

We do not agree. In Casperone, the waiving party participated in the trial; in this case, the district court reinstated the County and proceeded to a bench trial one hour later, giving the County an insufficient opportunity to assert its rights. By the time the County Judge and Prosecutor arrived in the courtroom, trial to the court was well underway. Any attempt by the County to assert its right to a jury trial at that time would have been futile. The judge had already repeatedly stated that this was to be a bench trial and it was to start testimony that day. The judge's flexibility on issues of reopening discovery and recalling witnesses by necessity assumed that the trial would be to the court. The County did not waive its right to a jury trial by failing to make a futile motion.

Nor did the County participate in this trial via the representation of Ludlum & Ludlum. Ms. Bennett notes, correctly, that Fed. R. Civ. P. 54(b) provides that a party dismissed under Rule 12(b)(6) remains in the case until final resolution of all claims as to all parties, unless the district court expressly directs entry of judgment with regard to that party. Ms. Bennett interprets Rule 54(b) to mean that the County remained a party to this lawsuit throughout the entirety of the proceedings. She argues that Ludlum & Ludlum undertook to represent the County at the 12(b)(6) stage of the litigation, and that because the County remained a party, Ludlum & Ludlum continued to represent the County thereafter. Ms. Bennett points out that although Ludlum & Ludlum moved to withdraw from representation of the Sheriff individually, the firm never asked to withdraw from representing the County. Accordingly, when the district court reinstated the County as a party, Ludlum & Ludlum still represented the County. Ms. Bennett then asks us to treat attorney Ludlum's protestations that he represented the Sheriff only in his individual capacity as a motion to withdraw from representation, which, given the late date of the motion, the district court could deny. When attorney Ludlum and his associates proceeded to try the case, they did so on behalf of the County, placing this case on all fours with Casperone.

Our disagreement with Ms. Bennett begins with her construction of Rule 54(b). We agree with Ms. Bennett that Rule 54(b) kept the County in the lawsuit in the sense that Ms. Bennett could not appeal the dismissal at that time. But we disagree that the County reliance on Rule 54(b) for the proposition that Ludlum & Ludlum continued to represent the County, even though the County had been dismissed from

the case and even though the firm had since entered an appearance on behalf of a different party in the same litigation. We find especially puzzling Ms. Bennett's reliance on the fact that Ludlum & Ludlum never moved to withdraw from representation of a party that had been dismissed from the lawsuit. We also attach little significance to the fact that Ludlum & Ludlum moved to reopen discovery on behalf of "Presley Pippin, Jr., Individually and as Sheriff of Archer County, Texas, in his Official Capacity." The fact of the matter is that the County was out of the lawsuit at this point, and this pleading did not purport to bring the County back in. The parties' conduct throughout this litigation suggests confusion on the status of the County and the Sheriff in his official capacity as a parties, with pleadings referring alternatively to "Presley Pippin," "Archer County Sheriff Presley Pippin," or the "defendant." We will not let this confusion cause us to lose sight of the fundamental fact that the County had been dismissed from the case.

For similar reasons, we find unpersuasive Ms. Bennett's argument that the County waived its right to a jury trial when the parties agreed to arbitrate the case pursuant to 28 U.S.C. §§ 651-58. Again, the County remained a party to the lawsuit only in the sense that the 12(b)(6) ruling in its favor lacked the finality of a judgment. But nothing in the record suggests that the County agreed to arbitrate the suit against it. The County could hardly have been found to be jointly and severally liable for the arbitration award having been dismissed from the case. Plaintiff's counsel conceded at oral argument that the arbitration award ran only against the Sheriff individually. The County was not a party to the arbitration and accordingly was not a party to any waiver attending those proceedings.

We hold that the County did not waive its right to trial by jury. We reverse the judgment below against the County and remand for a new trial.[6]

V

The Sheriff individually argues that the district court erred in finding that he engaged in sexual intercourse with Ms. Bennett without her consent and that the rape was under color of state law. We do not agree.

We find no clear error in the district court's factual finding that the Sheriff raped Ms. Bennett. At bottom, this case turned on whether the district court believed Ms. Bennett or the Sheriff. The court believe Ms. Bennett, and that call belongs to the district court. We will not upset such a finding on appeal.[7]

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[6]For the above reasons, we also reverse the district court's judgment holding the County vicariously liable under state tort law for the Sheriff's rape and remand for a new trial on this issue. We express no view at this time regarding whether the County may be held vicariously liable for the Sheriff's violation of state tort law. See Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (Vernon 1986). We believe the district court should consider the County's arguments on this issue in the first instance.

[7]It is possible that the district court considered the following portions of the Sheriff's testimony in deciding whether to believe the Sheriff's statement that Ms. Bennett consented to have sex:

> [Plaintiff's counsel]: But she said several things like no, didn't she?

We also find no error in the district court's conclusion that the Sheriff acted under color of state law when he raped Ms. Bennett. The district court found that the Sheriff questioned Ms. Bennett about the earlier shooting for 30-45 minutes as the two sat on her porch, just before the rape occurred. The court also found that, in response to Ms. Bennett's refusals to have sex, the Sheriff said, "I can do what I want, I'm the Sheriff." The Sheriff himself testified that he used his authority as Sheriff to ascertain whether Mr. Bennett would be released from the hospital on the night of the rape. The plaintiff needed the Sheriff's permission to retrieve her pickup truck and to change her place of residence. Under such circumstances, we cannot argue with the district court's observation that "it was not lost on Gail Bennett (or the Sheriff) that the Sheriff carried the keys to the Archer County Jail with him in his pocket and wielded coercive power over Gail Bennett." The Sheriff's actions were an abuse of power held uniquely because of a state position, see United States v.

> [The Sheriff]: She said one thing that was very coy.
> [The Court]: What do you mean by that?
> [The Sheriff]: Really not serious.
> [Plaintiff's counsel]: Well, what was it that she said?
> [The Sheriff]: "I don't know whether this is a good idea or not," just sort of a smile on her face.
> [Plaintiff's counsel]: You would refer to that, perhaps, as token verbal resistance?
> [The Sheriff]: Yeah, I suppose so.
> . . .
> [The Court]: So you understood a no not to really mean no?
> [The Sheriff]: Yes, sir.

Classic, 313 U.S. 299, 326 (1941), and the explicit invocation of governmental authority constituted a "real nexus" between the duties of Sheriff and the rape. Doe v. Taylor Independent School District, 15 F.3d 443, 452 n.4 (5th Cir.), cert. denied, 115 S. Ct. 70 (1994).

VI

Sheriff Pippin's other arguments are also without merit. The Sheriff complains that the district court erred on a series of evidentiary rulings. The Sheriff further contends that these errors, together with other comments from the bench, demonstrated that the trial judge was personally biased against the Sheriff. We review the district court's evidentiary rulings for abuse of discretion, and we will reverse on the basis of evidentiary errors only if they resulted in substantial prejudice to the Sheriff. Smith v. Wal-Mart Stores (No. 471), 891 F.2d 1177, 1180 (5th Cir. 1990). We find any error in the district court's evidentiary rulings harmless. Regarding improper bias, the Sheriff must show that "there are reasonable grounds for finding that the judge could not try the case fairly, either because of the appearance or the fact of bias or prejudice." United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), cert. denied, 449 U.S. 1012 (1980). We find no hint of bias.

The Sheriff's first evidentiary complaint concerns the testimony of Austin Police Department Sergeant Robert Merrill, the first law enforcement official to hear of the Sheriff's rape. Ms. Bennett's counsel asked why Merrill had traveled 300 miles to testify in this case, and the district court overruled the defense's relevance and opinion objection. Sergeant Merrill then stated, "I felt like [Bennett] had unconsensual sex either by force,

threat, or intimidation, and I don't think this case was handled properly through the criminal courts." This statement did not substantially prejudice the Sheriff. The district court had already made clear that he would not consider Merrill's opinion of Bennett's credibility in making its own decisions on whom to believe, and the court's written memorandum does not rely upon it.

The Sheriff next objects to Bennett's testimony that she thought the Sheriff's questions to her on the porch shortly before the rape were normal law enforcement questions, on the ground that this testimony required expert knowledge. Bennett's state of mind at the time was relevant to the question of whether she later bowed to a show of authority or engaged in consensual sex. She was competent to testify to her own state of mind.

Third, The Sheriff objects that the district court allowed Bennett to compare her feelings in a bout of depression prior to the rape with those after the rape. The Sheriff argues that only an expert could give such testimony. The district court's memorandum did not mention this testimony, and any error in its admission was harmless.

Fourth, the Sheriff complains on relevance grounds that the district court allowed plaintiff's counsel, during cross-examination of the Sheriff's to elicit testimony that some suspects in potential homicide investigations would have difficulty refusing the advances of the officer in charge of the investigation, and that such suspects might be intimidated by the power of a sheriff. This testimony was relevant to the issue of willful disregard of the plaintiff's rights, a question raised by the request for punitive damages.

Lastly, the Sheriff complains that the district court sua sponte prevented the defense from questioning Bennett about her post-rape sexual activity. The Sheriff contends that this element was relevant to show that Bennett suffered a little psychological harm from the rape. Fed. R. Evid. 412(a)(2) excludes "in any civil . . . proceeding involving alleged sexual misconduct . . . [e]vidence offered to prove that any alleged victim engaged in other sexual behavior." The Sheriff contends that this evidence was admissible under the exception included in Rule 412(b)(2). Although the logic of this argument escapes us, we will not consider it, because the Sheriff admits that he did not lay the necessary predicate for this evidence by following the procedures outlined by Rule 412(c).

We also find unconvincing the Sheriff's argument that the district court's evidentiary rulings, comments from the bench, and questioning of witnesses demonstrated improper bias. The evidentiary rulings of which the Sheriff complains either were correct or constituted harmless error. The district court's comments exhibited at most a sense of humor at a bench trial.[8] Regarding the questioning of witnesses, the court extensively questioned all of the witness at the end of cross-examination, and the court was evenhanded.

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[8]The district court stated that the docket was not a boring one, that the facts resembled those of a TV movie, and that despite his experiences watching goat ropings at the county fair he had never seen a fact situation resembling that in the case at bar.

We REVERSE the judgment against the County entered by the district court and REMAND for a new trial. We AFFIRM the judgment against the Sheriff individually. The verdict and judgment against the Sheriff in his individual capacity determined no issue in the suit yet to be tried against the County.[9] Because we have not affirmed the judgment in its entirety, we REMAND the issue of attorneys' fees for resolution upon conclusion of the case in the district court.

Affirmed in part, reversed in part, and remanded.

U.S. COURT OF APPEALS
FILED
JAN 24 1996
CHARLES R. FULBRUGE III
CLERK

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[9]Evidence of the verdict or judgment should not be admissible at the new trial. We have, of course, rejected the County's attempt to prevail outright on the issues of Monell policy or custom and insufficiency of the allegations in the complaint.

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

_____

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

_____

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-10380

ELLEN GAIL BENNETT

Plaintiff - Appellee

v.

PRESLEY PIPPIN, JR, Individually and as Sheriff of Archer County, in his official capacity (as Sheriff of Archer County, in his official capacity deleted as per Order dated 11/16/92 - leaving Presley Pippin Jr Individually as dft) (Presley Pippins Jr, as Sheriff of Archer County, in his official capacity, reinstates as per oral order of Judge Joe Kendall during non-jury trial 2/10/95)

Defendant-Appellant

and

ARCHER COUNTY TEXAS

Movant - Appellant

Appeals from the United States District Court for the Northern District of Texas, Wichita Falls

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ON PETITION FOR REHEARING
(March 1, 1996)

Before REAVLEY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for

rehearing filed in the above case are DENIED.

ENTERED FOR THE COURT:

/S/ PATRICK E. HIGGINBOTHAM
United States Circuit Judge

REHG-2

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

U.S. COURT OF APPEALS
FILED
[illegible] 1 1996
CHARLES R. FULBRUGE III
CLERK

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	**§**	
Plaintiff,	**§**	
VS.	**§**	**CIVIL ACTION**
	§	**NO. 7:92-CV-98-X**
PRESLEY PIPPIN, JR.,	**§**	
Individually and in	**§**	
his Official Capacity	**§**	
as Archer County,	**§**	
Sheriff,	**§**	
Defendant.	**§**	

ORDER DENYING INDIVIDUAL DEFENDANT'S MOTION TO VACATE JUDGMENT, AND FOR NEW TRIAL

Before the Court is a Motion of Defendant, in his Individual Capacity, to Vacate February 27, 1995, Judgment and for a New Trial which was filed March 15, 1995. After due consideration, the Court is of the opinion that said motion should be, and hereby is, DENIED.

IT IS SO ORDERED.

SIGNED this 3rd day of April, 1995.

/S/
JOE KENDALL
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 3 1995
NANCY DOHERTY, CLERK

By /S/
DEPUTY

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	**§**	
Plaintiff,	**§**	
VS.	**§**	**CIVIL ACTION**
	§	**NO. 7:92-CV-98-X**
PRESLEY PIPPIN, JR.,	**§**	
Individually and in	**§**	
his Official Capacity	**§**	
as Archer County,	**§**	
Sheriff,	**§**	
Defendant.	**§**	

ORDER MODIFYING JUDGMENT

Before the Court is Plaintiff's unopposed Motion to Modify Judgment pursuant to Fed.R.Civ.P. 59(e) which was filed March 7, 1995. After due consideration, the Court is of the opinion that said motion should be, and hereby is, **GRANTED** as follows.

The Court's Judgment, entered on February 27, 1995, is hereby modified to allow Plaintiff to recover from Defendant PIPPIN and ARCHER COUNTY, TEXAS, jointly and severally, prejudgment interest on the $1,000,000.00 compensatory damage award at the rate of 10% simple interest per annum for the period from June 30, 1992 through February 26, 1995, 971 days. The total amount of prejudgment interest to be assessed comes to $265,956.90.

IT IS SO ORDERED.

SIGNED this 12th day of April, 1995.

/S/
JOE KENDALL
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 12 1995
NANCY DOHERTY, CLERK

By /S/
DEPUTY

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	§	
Plaintiff,	§	
	§	
VS.	§	**CIVIL ACTION**
	§	**NO. 7:94-CV-98-X**
PRESLEY PIPPIN, JR.,	§	
Individually and in	§	
his Official Capacity	§	
as Archer County,	§	
Sheriff,	§	
Defendant.	§	

FINAL JUDGMENT

Following a non-jury trial on February 10, 1995 and February 17, 1995, the Court has entered its Findings of Fact and Conclusions of Law entered this same day, February 27, 1995. In accordance therewith, the Court hereby ORDERED and ADJUDGES that Plaintiff, ELLEN GAIL BENNETT, recover from Defendant PIPPEN and Archer County, Texas, jointly and severally, the compensatory damage amount of $1,000,000.00 plus future interest at the statutory rate of 7.03% until paid.

It is further ORDERED and ADJUDGED that Plaintiff, ELLEN GAIL BENNETT, recover from Defendant PIPPEN, individually, the punitive damage amount of $1,000,000.00 plus future interest at the statutory rate of 7.03% until paid.

It is further ORDERED and ADJUDGED that all costs of court shall be assessed against the Defendant and Archer County, Texas, jointly and severally.

IT IS SO ORDERED.

SIGNED this 27th day of February, 1995.

/S/
JOE KENDALL
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
FEB 27 1995
NANCY DOHERTY, CLERK

BY /S/
DEPUTY

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	§	
Plaintiff,	§	
	§	
VS.	§	**CIVIL ACTION**
	§	**NO. 7:92-CV-098-X**
PRESLEY PIPPIN, JR.,	§	
Individually and as	§	
SHERIFF FOR ARCHER	§	
COUNTY, TEXAS, in	§	
his official capacity,	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff Ellen Gail Bennett is a resident of Travis County, Texas.

2. Defendant Presley Pippin, Jr. is a resident of Archer County, Texas. At all times relevant herein, defendant Pippin was the Sheriff of Archer County, Texas.

3. In June 1990, Gail Bennett reconciled with her ex-husband, Tony Bennett, and moved to Archer County, Texas to reside with him.

4. On the evening of July 2, 1990, Plaintiff and Tony Bennett were involved in a domestic dispute. Tony was intoxicated and became physically violent toward Plaintiff. The argument escalated through the evening with Tony Bennett slamming Plaintiff into the wall. Tony Bennett ripped the telephone from the wall. About 10:00 p.m. Gail Bennett got in her pick-up to leave, but before she could leave, Tony aimed a loaded rifle at her head. Fearing for her life, Plaintiff then shot Tony in the chest with a revolver kept in her pick-

up truck.

5. Because Tony had pulled the phones out of the wall, Plaintiff drove toward Wichita Falls, Texas, to find a phone to call an ambulance and the police. Wichita Falls Police Officer Betty King was dispatched to arrest Bennett and transport her to the county jail. Because the shooting had occurred just over the county line in Archer County, Archer County was notified and Archer County Deputy Berryman requested that Wichita Falls law enforcement arrest Ms. Bennett. Sheriff Pippin came on the squad car radio and countermanded that order and radioed that he would come to Wichita Falls to take custody of Ms. Bennett. Archer County Sheriff Deputy Berryman termed the order "unusual."

6. Sometime after 11:00 p.m. Defendant Pippin arrived in Wichita Falls to take custody of Ms. Bennett. This was the first time the Plaintiff and Defendant met. Pippin read Ms. Bennett her Miranda warnings and questioned her about the shooting. Plaintiff was visibly upset at this time. Pippin explained to Ms. Bennett that he was not going to jail her at that time, that an investigation would be conducted and the case presented to an Archer County Grand Jury for action by them. He then transported her back to the shooting scene (her house) and turned her over to Deputy Berryman. Throughout this time Ms. Bennett was visibly upset over the shooting of her husband. Ms. Bennett's vehicle was impounded by the Wichita Falls Police at the request of the Archer County Sheriff's Office. It was at this time thought that Tony Bennett might die and the attempted murder case might turn into a homicide case.

7. About 12:30 a.m. July 3, 1990, deputies took Ms. Bennett to the Archer County Sheriff's office where she was

fingerprinted, photographed and again read Miranda warnings. Ms. Bennett was then questioned and asked to sign a written statement regarding the shooting. She was not jailed at that time, but was told that she should not leave the County without the permission of the defendant, Archer County Sheriff, P.L. Pippin, Jr.

8. While Ms. Bennett was being questioned at the Sheriff's office in Archer City, the Sheriff answered a call for service regarding a grass fire and notified the dispatcher of his location. Thereafter, he drove around for a period of time waiting for Ms. Bennett to return to her home.

9. At about 2:15 a.m. on July 3, Deputy Berryman drove Ms. Bennett back to her home and notified the dispatcher. Shortly after Berryman departed, defendant Pippin arrived at Plaintiff's home. He did not notify the Sheriff's Office dispatcher that he was at the shooting suspect's home. This was about 2:30 a.m.

10. After Deputy Berryman brought her home, Ms. Bennett left to make a phone call and returned to her house to find the Sheriff there. She and the Sheriff sat on the porch while the Sheriff questioned her about the shooting and her background. The Sheriff led Ms. Bennett to believe that this questioning was part of the investigation and she felt compelled to answer. The conversation continued for 30 to 45 minutes, at which point the Sheriff touched Ms. Bennett in a way that made her feel uncomfortable. At that point, Ms. Bennett told the Sheriff that she was tired and would prefer to answer any further questions in the morning. The Sheriff indicated that would be alright and stepped off the porch to leave or, at least, Ms. Bennett believed he was leaving. Ms. Bennett went inside.

11. Sometime after she had gone to bed and fallen asleep, Plaintiff awoke to find the Defendant standing over her bed, naked. The Court finds that the defendant proceeded to have sexual intercourse with Ms. Bennett against her will.

12. While there was no violence or express threats, given the events of the four or five hours which immediately preceded the sexual intercourse between Bennett and Pippin, and given the relative position between the two (criminal defendant and the investigating Sheriff), this sexual intercourse was clearly without the victim's effective consent. She told the Sheriff that she did not want to and he replied "I can do what I want, I'm the Sheriff." Contrary to the Sheriff's belief, the Court finds that when a woman says "no" it means "no." The Sheriff stated that when she said "no" he thought she was "being coy" and in sworn testimony termed her communication to him as "token verbal resistance."

13. Sheriff Pippin seems to believe that rape is constituted only when consent is extracted by gun, knife, fists or verbal threats of violence. The Court finds that it was not lost on Gail Bennett (or the Sheriff) that the Sheriff carried the keys to the Archer County Jail with him in his pocket and wielded coercive power over Gail Bennett.

14. The Court finds that P.L. Pippin, Jr., had sex with this woman without her consent and raped her as surely as if he had pulled his gun on her and forcibly compelled the sex.

15. The Court finds the actions were done under color of law, while the Sheriff was in the course of an attempted murder investigation in the discharge of his duties. This is not some woman he met in a

bar, but the suspect in an attempted murder investigation his office began investigating four or five hours earlier. This shows not only his official capacity, but also goes to demonstrate the lack of de facto consent and the insidious abuse of policy authority here.

16. When it became apparent that further resistance would be to no avail, Ms. Bennett asked the Sheriff to use a condom. When he was done, defendant forced plaintiff to take a shower and stated that she should not tell anyone what he had done. The Court finds these orders were to destroy forensic evidence and to evade detection.

17. Two days later, Sheriff Pippin told Ms. Bennett she could leave the County but only upon the condition that she leave a phone number and address where she could be reached. Ms. Bennett moved to Austin.

18. Within a couple of days after her move, Gail Bennett made an "outcry" to her friend, in confidence, in Austin, Texas, regarding the sexual assault. Fearing the Sheriff's influence and political power in a small, rural county like Archer County, Texas, Gail Bennett decided to do nothing until the Archer County criminal case regarding her husband's shooting was resolved.

19. Soon after her arrival in Austin, Travis County, Texas, she began to get telephone calls from defendant Pippin. During these calls he reminded Ms. Bennett of the investigation and pending grand jury proceedings against Ms. Bennett and inquired whether she had told anyone what he had done to her. These calls occurred frequently during July, August, and September 1990, as demonstrated by the telephone records in evidence.

20. On September 2, 1990, the Archer County grand jury declined to indict Ms. Bennett in the shooting of her husband. The Sheriff continued to call Ms. Bennett after she was no-billed. In one of these conversations, she confronted the Sheriff saying that he had raped her. The Sheriff told no one of this accusation which he claims is false. Instead, the Sheriff called her back asking to meet her personally to "return her gun to her." The Sheriff testified it was not the usual practice to hand deliver shooting suspects' firearms back to them, particularly when the shooting suspects were several hundred miles away.

21. Ms. Bennett reported what the Sheriff had done to her to the Austin Police Department in late September, 1990. The Austin Police Department, after giving Gail Bennett a polygraph examination, began an investigation and referred the case to the Texas Rangers of the Texas Department of Public Safety.

22. On October 3, 1990, under supervision of the City of Austin Police Department, plaintiff met defendant at an Austin, Texas restaurant. At that meeting, defendant returned plaintiff's gun and again indicated that she should not tell anyone what he had done to her.

23. Both the Plaintiff and Defendant testified at trial. After hearing the direct and cross examination of each witness, viewing their demeanor in Court, and considering each one's version of events, the Court finds the Plaintiff to be credible and the Defendant to be not credible. The Court believes the Plaintiff and does not believe the Defendant.

24. The Court finds that the above-described actions of Sheriff Pippin caused

Plaintiff damages. The Sheriff was acting in his official capacity when his actions caused the Plaintiff to suffer emotional distress, humiliation, and mental anguish during and in the aftermath of the sexual assault by the Sheriff. This suffering was aggravated by the circumstances of the assault, occurring as it did, in the immediate aftermath of the shooting of her ex-husband. Ms. Bennett's suffering was compounded by the harassing calls she received from the Sheriff. Plaintiff was clearly in fear during the months following the incident. She began behaving compulsively, showering frequently and suffering from insomnia. Plaintiff's fear, anxiety, and emotional distress only increased when the Archer County Grand Jury no-billed the Sheriff on her rape charges from the Austin Police Department investigation. Plaintiff's fear led her to move to Corpus Christi, Texas, where she continued to have nightmares, sleeplessness, and trouble concentrating. These symptoms adversely affected Plaintiff's ability to work and continue to affect Plaintiff. Although Plaintiff's life was not free from stress and trauma before this incident, that prior history in no way diminishes the suffering she experienced as a result of this incident. Plaintiff is reasonably likely to continue to suffer mental anguish in the future as a result of the Sheriff's actions. She is unlikely to ever regain the same level of trust in public officials that she had before the incident. This loss of her sense of safety has changed Ms. Bennett's life, rendering her far more fearful and less outgoing than she was before.

25. As a result of the actions of the Sheriff, Plaintiff sought psychological counseling and has been receiving therapy more or less continuously since the events of July 1990, at least to the extent that

Ms. Bennett could afford such care. The evidence indicates that Ms. Bennett has incurred at least $10,200 in expenses for counseling, an amount which the Court finds reasonable and necessary under the circumstances. The Court finds that it is reasonable likely that Plaintiff will continue to need psychological counseling in the future as a result of the Sheriff's actions.

26. The Court must also answer the question as to "what is it worth for a woman to be raped?" Putting a dollar amount on such a heinous act is difficult, but the Court finds that the amount of monetary damage for such an injury is very substantial.

27. At the time of the sexual assault, Sheriff Pippin was acting in his official capacity under color of state law and was able to perpetrate the sexual assault precisely because of the criminal investigation of the victim for shooting her husband only hours earlier.

28. As Sheriff, P.L. Pippin, Jr. was the head law enforcement officer of Archer County, Texas. He set policy and procedures for the County Sheriff's office, hired and fired all deputies, and was/is accountable to no one except the registered voters of Archer County, Texas, every four years.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. § 1343 (3) & (4).

2. The above described actions of Sheriff Pippin were taken under color of law as that phrase is used in 42 U.S.C. § 1983. The entire incident with Plaintiff arose out of the Sheriff's official duties

investigating the shooting of Tony Bennett which occurred the evening of July 2, 1990. The Sheriff gained access to Plaintiff's house in the middle of the night on the basis of his official investigation, and he used his position and authority over Plaintiff (who was facing pretrial detention and potential grand jury indictment depending on the outcome of the Sheriff's investigation) to intimidate her and guarantee her silence. In short, the Sheriff's assault on Plaintiff arose out of his official duties and constituted a "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed in the authority of state law." United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991); Doe v. Taylor 15 F.3d 443, 452 n. 4 (5th Cir. 1994) (en banc) (teacher who uses his official position to sexually molest student acts under color of law); U.S. v. Lanier, 33 F.3d 639, 653 (6th Cir. 1994) (judge who used his position to sexually assault employees acted under color of state law).

3. Sheriff Pippin's actions in using his official position to sexually assault plaintiff and threaten her deprived plaintiff of her constitutional right to personal security and bodily integrity, liberty interests protected by the substantive due process component of the Fourteenth Amendment. Taylor I.S.D., 15 F.3d at 451 (teacher's sexual abuse of student violates student's substantive due process rights); Lanier, 33 F.3d at 650-52 (sexual assault violates liberty interests), L.W. v. Grubbs, 974 F.d 119 (9th Cir. 1992) (prison officials whose deliberate indifference allowed an inmate to rape a prison nurse violated the nurse's substantive due process rights); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (en banc) (deliberate indifference by police officer which leads to sexual assault

violates liberty interests); Hudspeth v. Figgins, 584 F.2d 1345 (4th Cir. 1978) (intentionally placing individual in fear for her life states § 1983 claim).

4. The Sheriff is liable in his official capacity as Sheriff of Archer County, Texas as well as in his individual capacity. The Sheriff was the chief law enforcement officer for Archer County and its final policy-maker in the area of law enforcement. Turner v. Upton County, Tex., 915 F.2d 133, 136 (5th Cir. 1990); Familias Unidas v. Briscoe, 619 F.2d 404 (5th Cir. 1980). The Sheriff abused his official position as Sheriff in carrying out his sexual assault of the Plaintiff and is, thus, liable in his official and individual capacities. Turner, 915 F.2d at 136-7. The fact that the County did not authorize the Sheriff to assault Plaintiff is irrelevant. Turner, 915 F.2d at 137 n. 3. Accordingly, the Sheriff and Archer County will be held jointly and severally liable for the compensatory damages awarded to Plaintiff.

5. Sheriff Pippin is not entitled to qualified immunity. The right of citizens to be free from assault by the police was clearly established long before 1990. Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981). The right to be free from sexual assault was also clearly established. Taylor I.S.D., 15 F.3d at 455 (finding that the constitutional right to be free from sexual assault was well established by 1987). This Court previously rejected Defendant's claim of qualified immunity.

6. Defendant's actions constitute assault and battery and false imprisonment under the common law of the State of Texas, as well as sexual assault and official oppression under state statutory law.

7. The Court finds that the actions

of Defendant Pippin directly and proximately caused Plaintiff $1,000,000.00 in present and future damages. See e.g., Berry Property Management v. Bliskey, 850 S.W.2d 644, 664 (Tex. App. - Corpus Christi 1993) (awarding $3,013,760 compensatory damages for rape); Salinas v. Ft. Worth Cab & Baggage Co., Inc., 725 S.W.2d 701 (Tex. 1987) (upholding award of $2,000,000 compensatory damages for rape by driver of cab); Ratcliffe v. Greystone Group, No. 85-43997 (Harris Co., 55th Judicial District, Oct. 1988) (million compensatory damages for rape) (see attached); Landy v. Parkway Regional Medical Center, Inc., No. 83-38063 (Fla. Dade Co. Cir. Court July 1985) ($720,000 in compensatory damages after reduction by 25 % for comparative negligence, for rape on hospital grounds) (See attached); Blackburn v. Snow, 771 F.2d 556, 572-3 (1st Cir. 1985) (awarding $177,040 in compensatory damages for strip searches that caused post traumatic stress syndrome). A judgment holding Sheriff Pippin and Archer County jointly and severally liable in that amount will be entered.

8. Because the Sheriff clearly acted willfully and with reckless indifference to Ms. Bennett's rights, punitive damages in the amount of $1,000,000.00 are also appropriate and a judgment assessing such damages against Sheriff Pippin individually will be entered.

9. To the extent that any of the above findings of fact herein should be more properly construed to be a conclusion of law, or vice versa, it is so deemed.

IT IS SO ORDERED.

SIGNED THIS 27th DAY OF FEBRUARY, 1995.

/S/
JOE KENDALL
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
FEB 27 1995
NANCY DOHERTY, CLERK

BY /S/
DEPUTY

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	§	
	§	
Plaintiff,	§	
v.	§	
	§	CA 7:92-CV-098-X
PRESLEY PIPPIN, JR.,	§	
Individually and as	§	
SHERIFF OF ARCHER	§	
COUNTY, TEXAS, in his	§	
official capacity,	§	
	§	
Defendant,	§	

/

ORDER AWARDING ATTORNEYS'
FEES AND EXPENSES

Came on to be heard Plaintiff's motion for attorneys fees and expenses pursuant to 42 U.S.C. § 1988. The Court having considered the motion, the arguments of counsel, and the record of this case finds,

THAT Plaintiff is the prevailing party in this action under 42 U.S.C. § 1983 and is, therefore, entitled to recover reasonable attorneys fees and costs pursuant to 42 U.S.C. § 1988;

THAT the hours expended by Plaintiffs' attorneys, law clerks and paralegals in litigating this case were reasonable particularly in light of the results obtained and the experience and ability of counsel;

THAT the hourly rates requested by Plaintiffs' attorneys are reasonable in light of the results obtained, the experience and ability of counsel and the customary fees for counsel of similar experience and ability;

THAT, in light of the results obtained and the fact that the fee in this case was entirely contingent on the Plaintiffs' ultimate success, Plaintiff should recover the full lodestar amount of the fees claimed by her attorneys without reduction.

It is, therefore, ORDERED that Plaintiff Ellen Gail Bennett recover from Defendant Presley Pippin and Archer County, Texas, the following attorneys' fees and expenses:

WISEMAN, DURST, TUDDENHAM, & OWEN
Edward Tuddenham 259.5 hrs. at $225.00/hr. $58,387.50
Patrick Wiseman 3.75 hrs. at $225.00/hr. $843.75
Law Clerk/paralegal 7.3 hrs. at $50.00/hr. $365.00
Expenses $2,625.75

TOTAL FEES AND EXPENSES AWARDED: $133,235.58

DONE THIS 13th day of April, 1995.

/S/
JOE KENDALL
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 13 1995
NANCY DOHERTY, CLERK

By /S/
DEPUTY

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	§	
Plaintiff,	§	
	§	
VS.	§	**CIVIL ACTION**
	§	**NO. 7:92-CV-98-X**
PRESLEY PIPPIN, JR.,	§	
Individually and in	§	
his Official Capacity	§	
as Archer County,	§	
Sheriff,	§	
Defendant.	§	

ORDER DENYING ARCHER COUNTY, TEXAS', MOTION FOR NEW TRIAL

Before the Court is Archer County, Texas', Motion for New Trial which was filed March 15, 1995. After due consideration, the Court is of the opinion that said motion should be, and hereby is, DENIED.

IT IS SO ORDERED.

SIGNED this 3rd day of April, 1995.

/S/
JOE KENDALL
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 3 1995
NANCY DOHERTY, CLERK

BY /S/
DEPUTY

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	§	
Plaintiff,	§	
	§	
VS.	§	**CIVIL ACTION**
	§	**NO. 7:92-CV-98-X**
PRESLEY PIPPIN, JR.,	§	
Individually and in	§	
his Official Capacity	§	
as Archer County,	§	
Sheriff,	§	
Defendant.	§	

ORDER DENYING OFFICIAL DEFENDANT'S MOTION FOR NEW TRIAL

Before the Court is a Motion of Defendant, in his Official Capacity, for a New Trial which was filed March 15, 1995. After due consideration, the Court is of the opinion that said motion should be, and hereby is, DENIED.

IT IS SO ORDERED.

SIGNED this 3rd day of April, 1995.

/S/
JOE KENDALL
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 3 1995
NANCY DOHERTY, CLERK

By /S/
DEPUTY

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	**§**	
	§	
Plaintiff,	**§**	
VS.	**§**	**CIVIL ACTION**
	§	**NO. 7-92-CV-098-K**
PRESLEY PIPPIN, JR., Individually and as SHERIFF OF ARCHER COUNTY, in his official capacity,	**§**	
	§	
Defendant.	**§**	

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO DISMISS

Pending before the court is Defendant's Motion to Dismiss Pursuant to Rules 12(b)(3) and (6). Judge Sparks of the Western District, having disposed of the 12(b)(3) grounds for dismissal by his transfer of this case to the Northern District on August 7, 1992, leaves only the 12(b)(6) issue for this Court to decide. After careful consideration of the complaint, motions, affidavits, briefs and the applicable law, it is the opinion of the Court that Defendant's Motion to Dismiss should be GRANTED as to the Defendant in his official capacity and DENIED as to the Defendant in his individual capacity.

In her Complaint, the Plaintiff alleges that the Defendant, after having questioned the Plaintiff about a shooting involving her husband, returned to the Plaintiff's home the same day and raped her. The Plaintiff claims the Defendant then threatened the Plaintiff not to tell anyone. The Plaintiff claims that the Defendant continued to harass her and use the in the ongoing investigation of her husband's shooting to

threaten her. The Plaintiff is suing for violations of her Constitutional rights and assault, battery, and emotional distress as pendant state claims.

In his Motion, the Defendant asserts that the Plaintiff has not established the essential elements to rebut the Defendant's qualified immunity defense and that the Plaintiff has not established a cause of action under 42 U.S.C. 1983. The court will analyze this Motion to Dismiss on two levels: the cause of action against the Defendant in (1) his official capacity and (2) his individual capacity.

OFFICIAL CAPACITY

In Brandon v. Holt, 469 U.S. 464 (1985) the Supreme Court made it clear that an action brought under § 1983 against a police official in his official capacity is tantamount to an action against the public entity for which the official is alleged to act. Under the heightened pleading standard required for § 1983 claims, a complaint must allege with particularity all material facts establishing a Plaintiffs right of recovery, including detailed facts supporting the contention that [a] plea of immunity cannot be sustained," Elliot v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985), and, in cases like this one, facts that support the requisite allegation that the municipal entity engaged in a policy or custom for which it may be held responsible. Palmer v. City of San Antonio, 810 F.2d 514, 517 (5th Cir. 1987). An isolated incident is not sufficient to show that a custom exists. As the Fifth Circuit stated in Bennett v. City of Slidell, 728 F.2d 762, 768 n. 3 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016 (1985): " Isolated violations are not the persistent , often repeated, constant violations that constitute custom and policy." The Supreme court has elaborated

on the causal requirement by holding that the connection must be more than de facto: " the policy or custom must be the moving force of the constitutional violation." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978).

The allegations against the Defendant are, according to Brandon, allegations against the entity of Archer County, Texas. Nowhere in the Plaintiff's complaint does Plaintiff state what policy or custom of Archer County's Sheriff's Department resulted in the violation of plaintiff's person or Plaintiff's constitutional rights. The Plaintiff points to no official policy or pattern of violations in the Archer County Sheriff's Department that is the cause, however far removed, of Plaintiff's alleged injury. Finally, the Plaintiff advocates that the Court take the position that the Defendant, as sheriff and therefore policy maker of the department, was making the actions described by the Plaintiff the custom or policy of the Archer County Sheriff's Department. Barring a showing that the actions described were repeated at least once or were known to anyone but the Defendant, the Court is not persuaded by this reasoning. For these reasons, the cause against Defendant in his official capacity should be dismissed.

INDIVIDUAL CAPACITY

[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action ... assessed in the light of the legal rules that were "clearly established" at the time it was taken. Anderson v. Creighton, 483 U.SW. 635 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). The Plaintiff states in great detail the

actions that are the basis for the claims against the Defendant in his individual capacity. The actions described, while still unproven, would clearly violate "claearly established" legal rules for law enforcement officers.

Therefore, it is the ORDER of the Court that the Defendant's Motion to Dismiss be GRANTED as to the Defendant in his official capacity and DENIED as to the Defendant in his individual capacity.

IT IS SO ORDERED.

SIGNED this 16th day of November, 1992

/S/
DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 16 1992
NANCY DOHERTY, CLERK

By /S/
DEPUTY

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELLEN GAIL BENNETT,	*	
	*	
Plaintiff,	*	
VS.	*	
	*	**CA 7:92-CV-098-X**
PRESLEY PIPPIN, JR.,	*	
Individually and as	*	
SHERIFF OF ARCHER	*	
COUNTY, TEXAS, in his	*	**Wichita Falls, Texas**
official capacity,	*	**February 10, 1995**
	*	**9:00 a.m.**
Defendant.	*	
	*	

* * * * * *

VOLUME I

* * * * * *

TRANSCRIPT FROM THE TRIAL

BEFORE THE HONORABLE JOE KENDALL

UNITED STATES DISTRICT JUDGE

* * * * * *

Court Reporter:
Mary A. Twomey, CSR, RPR
1429 Tanbark Road
Wichita Falls, Texas 76305
(817) 851-7937

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT: This is Cause Number 7:92-CV-098, Ellen, E-l-l-e-n, Gail Bennett, two n's and two t's, Plaintiff, versus Presley L. Pippin, Junior, individually, and as Sheriff of Archer County, Texas, in his official capacity, and with that style of the case I need to take up some matters with counsel before we even begin.

As you will recall, Ladies and Gentlemen, the other day -- I forget now the date. I guess it was --

MR. TUDDENHAM: Tuesday?

THE COURT: Tuesday. Time flies when you're having fun, counsel. Tuesday we met and discussed this case. And as you know I was recently assigned the Wichita Falls docket, and this is my first week to actually have proceedings on this docket, and I am still in the process of familiarizing myself with the cases that are pending on this docket. And I began to learn about this case which has been pending for a couple of years.

The Sheriff of Archer County was sued in this case by the Plaintiff in both his individual capacity and his official capacity. On November the -- I now know the date to be November 16th, 1992, Judge David O. Belew, who had this docket before I did, entered an order dismissing under 12(b)(6) the sheriff in his official capacity and relying in that case on Leatherman, which I don't have a site in front of me now, but that is the case of which I know the 5th Circuit is quite familiar. And basically the opinion relies on the heightened pleadings standard set forth in that decision, and that at the time Judge Belew entered the order it required heightened pleadings for these types of actions. As we now know, after Judge Belew entered that order, the Supreme Court reversed the 5th

Circuit and -- and said that's no longer required.

There have been several cases out of the 5th Circuit since that time. One recent, Ricks versus Mississippi State Employment Services, very recently, that said that -- well, in Leatherman the Supreme Court only dealt with these matters under 1983 as to municipalities and they were to -- to dismiss cases where the pleadings did not comply with their ruling of heightened pleadings. And they have taken a position in several cases that the holding of the Supreme Court in Leatherman is to be construed narrowly to the facts at hand apparently, and that the rationale behind it, that is that -- as I understand Leatherman, that is that Congress sought to amend the federal rules, not judges; but in any event, they've taken the position, and it is the law of this circuit that that doesn't apply here.

Now, when I applied the specific facts of this case, Brandon versus Holt, and this is in Judge Belew's opinion, it makes it clear there was an action brought under 1993, a police official or law enforcement officer in their official capacity can have an action against the public entity, and if that is the case I've got a question in my mind that wouldn't put us squarely right back under the Supreme Court's version of Leatherman, and put the candle right back on the chopping block so to speak.

Now, on that I have not thoroughly made up my mind because there are a number of cases and there's a number of analyses to be done with regard to that, and too it can become a fact-specific inquiry.

And what I understand about this case is we're not talking about an allegation of a police officer who -- or a sheriff or a

deputy sheriff who goes out and in his individual capacity meets a woman in a bar and takes her out and rapes her. The facts here are a little bit different, and it may bear upon the analysis to be done with regard to official capacity status. In here we're talking about an allegation of -- of a woman shooting her husband at about ten, the sheriff having the responsibility for conducting an investigation of attempted murder, and then with four -- within four or five hours he's at her home having sex with her. And I don't really think it's disputed that he had sex with her. He claims it was consensual. She claims it was rape, and that no effective consent was given in that she felt compelled to -- to acquiesce to the demands because of the position of power that the sheriff held over her with regard to the investigation of that -- that attempted murder allegation.

Now, I say all that without passing any judgment whatsoever on the merits of any of these contentions. All I'm talking about now is dealing with allegations made in the 12(b) context and whether or not 12(b) should be applied under these facts to remove official capacity status given the clear -- clear case law that applies to 12(b)(6) that 12(b)(6) is -- the motion should be granted only when there is absolutely no set of circumstances whatsoever that one could conjure up that would -- would prove liability.

Frankly, I'm not sure that's this case here so bottom line -- I want to hear from both of you with regard to your positions on this, but the bottom line, is I'm kind of the opinion that because of Leatherman, the Supreme Court version, and because of the specific facts alleged in this case, that it ought to be taken that that order of Judge Belew of November of '92 ought to be vacated because the law has changed since he entered

his order, and that the Plaintiff be allowed to adduce evidence as to official capacity status, and if they can get there under -- if they can get there, then they can get there. And again realizing the -- what you're going to have to do to get there is policy and whether or not just because he's the Sheriff that automatically makes the policy of Archer County, whether you can introduce evidence in that regard.

Now, I know -- Mr. Ludlum, you represent the interest of Archer County, do you not?

MR. LUDLUM: I represent the interest of the Sheriff at this point, Your Honor.

THE COURT: I was under the impression Rosendo Rodriguez represented the individual, the Sheriff, and that you represented the interest of Archer County; am I incorrect?

MR. LUDLUM: No, sir. I represent the Sheriff in this case, and Mr. Rosendo Rodriguez is his personal attorney, and the reason he's here is because there is a coverage issue and to offer whatever guidance he needs to in view of that so I'm not --

THE COURT: That wasn't in the file. Who's paying you?

MR. LUDLUM: Paying me?

THE COURT: Yes.

MR. LUDLUM: Scotsdale Insurance Company.

THE COURT: And is that --

MR. LUDLUM: And Mr. Rodriguez is being paid by Sheriff Pippin.

THE COURT: I thought you were representing the interest of Archer County and representing the Sheriff in his individual capacity; am I wrong about that?

MR. LUDLUM: I'm not now. I'm representing him strictly in his individual capacity, and I think at this late date if the question were to come up we'd probably have to take the position that we have a conflict because probably the position of Archer County is going to be that their policy is not to -- to allow this kind of thing to happen, and they would probably divorce themselves from the position taken by the Sheriff, and there may be --

THE COURT: That's a -- that would be a convenient thing for them to do. I'm not sure they can do that though, but I will tell, you -- you mentioned the words "late date." I do think that if we put you, the County, the Sheriff, everyone from your side of the room to a disadvantage due to your thinking we're not going to litigate this matter --

MR. LUDLUM: Yes, sir.

THE COURT: -- and as far as that goes the Plaintiff as well, they were not perhaps anticipating the requirement to produce evidence. I would say to you that I am well cognizant of that, but this is a bench trial, and I have a great deal of flexibility with regard to giving continuances and reopening discovery if -- if you think that's necessary to meet these issues, but I really am confused by your representation that you don't represent the interest of Archer County.

The -- the insurance company that hired you, that policy, is that a policy of Archer County or is that the Sheriff's policy?

MR. LUDLUM: Archer County purchased the policy, but since Archer County has been out of the case I represent -- represent only the Sheriff in this case in his individual capacity, and that's the only basis I'm appearing here for today. If Archer County has an interest in it I don't -- for example, let me just sort of briefly outline what the situation is; one is, Archer County's policy provides coverage to all their official employees in certain types of functions; but they, for reasons that aren't important here, for a client to extend coverage in this case Archer County theoretically could be approached by the Sheriff for an indemnity in the event any judgment is taken against him, but Section 101.102 under the Texas Civil Practice and Remedies Code says that for certain types of acts Archer County cannot legally indemnify him. I dispute --

THE COURT: Whether that's -- whether that's so or not, I don't know, and whether or not -- perhaps if a judgment were taken against the County or the Sheriff I guess that y'all could duke that out with all the bad faith laws and swirls about other -- and all, but right now all I'm talking about it the 1983 action and --

MR. LUDLUM: Only thing I might add, Your Honor, is Archer County has never been a party to this lawsuit that I'm aware of.

MR. TUDDENHAM: Your Honor, if I could say something, the lawsuit was originally filed against the Sheriff in his individual capacity and against the Sheriff in his official capacity, which under the law is equivalent to suing the County. A county official in his official capacity, it's the very same thing as suing the County in its name. You can do it either way. It amounts to the same thing.

THE COURT: That's what I thought.

MR. TUDDENHAM: And when we filed the suit it was originally in Austin. There is a motion to transfer venue filed on behalf of both the Sheriff individually and officially, i.e. the County, by Mr. Ludlum. The 12(b)6 motion that got the County dismissed in the first instance was filed by Ludlum so he -- they entered an appearance in this case representing both the Sheriff individually and the Sheriff officially, which is the County.

When they were dismissed obviously what's left is the Sheriff individually, but I have assumed all along that we would reurge that the County be brought in and that if the district court didn't entertain that then perhaps the Court of Appeals would.

THE COURT: You were laying behind the law is what you're saying?

MR. TUDDENHAM: No. The case hadn't -- the County having been dismissed, I was not -- the evidence is the same. And frankly what we were going to do, because I know district judges don't like motions urged and reurged and reurged, is try the evidence, because I believe when Your Honor hears the evidence the motion to reconsider Judge Belew's ruling will make sense.

THE COURT: Well, I don't want to sandbag Mr. Ludlum. I want them --

MR. TUDDENHAM: I don't --

THE COURT: -- to go in with their head up right from the get-go knowing what I think, and I'll be real honest with you -- and let's talk. Does anyone see any problem with my reading on what Leatherman says and where we are here?

MR. TUDDENHAM: I agree with it, Your Honor.

MR. LUDLUM: I think your're correct on Leatherman.

THE COURT: All right. Then what we're going to do is as follows: I'm going to vacate the order of November 16th, 1992, inasmuch as the analysis and cases relied on by Judge Belew, particularly Leatherman has -- the law has changed since he made his ruling and -- and keeping in mind that we're still only talking about a 12(b)6 context -- allow both sides to introduce evidence, and that's -- and no one should take that as my reading that you can get there because that remains to be seen, but in any event I think that it would be silly and a colossal waste of judicial resources to not consider that claim when I'm going to have a trial with the exact same evidence, and then later on have to do it again when it would be quite simple to entertain the evidence, rule on the evidence as it is, and then if I make a decision that is erroneous and goes against the Sheriff I would a lot rather see a reversal remand. That is a much more efficient utilization of district court resources so that would be the rule of the Court.

Now, with regard to this business about the capacity in which you -- who you represent, Mr. Ludlum. I'm not real impressed with that because his point is well taken. Right from the beginning you certainly were representing the interests of the County, were you not?

MR. LUDLUM: Well, I was representing the Sheriff, our firm was, in his official and his individual capacity, but with the Sheriff out of his --

THE COURT: Let me -- let me -- let me

just put it this way. You -- you are now representing him again as you were in the beginning in his official and in his individual capacity, and we can worry about later what that means or how that works itself out in the event that a judgment is taken.

Now, the next question is, because this is occurring now what, if any, delay would you need and for what purpose? And I'm throwing that out to you because I do want to be fair to all concerned.

MR. LUDLUM: Certainly, Your Honor. I think that -- after having conferred with my co-counsel the one concern I've got is my inability to speak for Archer County since Archer County thinks it's out of the woods in this case. My own thought would be to allow us a week to inform Archer County, in fact, we can do that today, of what this development is and the potential impact it has and if it wants to get in with additional counsel and defend its interests I think it should do so, and I might add --

THE COURT: All right.

MR. LUDLUM: -- I might add that the coverage issue is a thing that creates a sticking point all the way around. It's not a matter in which I'm involved, but it's one which may be crucial between the Sheriff and the County, and I can't -- I can't --

THE COURT: All right. Okay. That -- that being the case, let me ask you, how is anyone harmed by going ahead and beginning the Plaintiff's case today and allow them to produce their evidence because their evidence is going to be the same whether the County's in or the County's out or you're in or you're out. They're still going to tell their tale of woe and I'm going to have to listen to their tale of woe and we're all

here and y'all are from everywhere else all over the state. You're here, and I'm here; what would be the harm in proceeding and going ahead and producing that evidence?

MR. LUDLUM: I think the only difference would be is that Archer County might insist on having counsel at some -- and if they do and want to protect their interest --

THE COURT: Wait a minute. I thought Archer County wasn't a party, and Archer County wasn't in it. I thought you were representing in an official -- the Sheriff in his official capacity.

MR. LUDLUM: At this point I'm representing him only in his individual capacity and have since the Court ruled, and that's why we've had a conflicting --

THE COURT: The Court just ruled that he's in his official capacity now.

MR. LUDLUM: And I think --

THE COURT: And you were in it to begin with so --

MR. LUDLUM: And I think that now bring back a conflict that was going on.

THE COURT: Why wasn't there a conflict in the beginning?

MR. LUDLUM: There may have been a conflict in the beginning, but we also at the same time felt this case would go out on a 12(b)6 as to the County and there wasn't a concern, but now the County has some potential exposure if the Sheriff were liable in his official capacity. Now they have a separate interest to protect. It's been gone for several years now, since '92.

THE COURT: He -- so you undertook representation knowing that you had a conflict of interest; is that what I'm hearing you to say?

MR. LUDLUM: No. We -- we felt at that time that Archer County would not go out of the loop.

THE COURT: But it was okay to represent them with a conflict of interest up to that time?

MR. LUDLUM: Well, everyone agreed to it up to that point. Archer County, the Sheriff, the insurance carrier, all were aware what the status was at that point. Now we potentially got Archer County --

THE COURT: I'm -- I'm sorry, counsel, but this makes no sense to me. Help me out here. How -- if you're in it in an official capacity; you make a 12(b)6 motion, I vacate the 12(b)6 motion; if there was not a conflict then, how is there a conflict now?

You're telling me there was a conflict back then and you violated the rules by agreeing to take the representation in a case which you knowingly had a conflict of interest?

MR. LUDLUM: No. No. At that time there was an agreement to proceed the way we'd proceeded to try to get the venue back into Wichita Falls in (inaudible) with 12(b). I now need to consult with Archer County and see if that's their view. That's what I'm saying.

THE COURT: Who in Archer County?

MR. LUDLUM: I imagine the county judge and the county commissioners. I suspect that's what I'd have to do.

THE COURT: Counsel?

MR. KOLKER: Your Honor, as -- as I can tell the Court's well aware, we are very ready to begin the trial, and we have got people from all over the state here. I don't think there's -- I have heard no claim that there's any further evidence that would be needed by reinstating the official capacity claim. I think we all understand it's the same evidence, and I think that by looking at the response we originally filed under the 12(b)6 motion we're relying on the position of the Sheriff as the official -- as the head of law enforcement in Archer County for that official capacity claim.

As to the -- these late claims that there is now a conflict I guess we feel that it's not really fair to us. The Court has ruled that Mr. Ludlum is to represent the county as official -- in its official capacity -- or the Defendant in his official capacity as he originally did. We -- I don't -- I guess I don't really understand what possible conflict there might be. Maybe I'm missing something, but I don't seem to understand it, but they clearly undertook representation through Mr. Ludlum.

We are most anxious to proceed, and I -- I can't see what harm would befall the Defendants by going ahead and taking testimony, and if they come up with a need for some further evidence that has not been articulated yet then maybe consider that, but we are most anxious in -- given the logistics in being here and what it's taken, to go ahead and proceed.

THE COURT: Mr. Ludlum, what would you like to say?

MR. LUDLUM: Response? I think we have an ethical obligation to let the County know what this new development is and let them

decide what they want to do about their position based on the reinstatement of the official capacity.

THE COURT: Well, you know, the thing is, that's all well and good, but they chose to hire you to represent him in both capacities; and this business about, well, you know, it's okay back then, but now that the rule's going to get you, it's not okay, I'm just not impressed by that, because if the -- if the waiver applied back then I certainly -- and I'm sure this Court was not -- Judge Belew was not party to that agreement, was he?

MR. LUDLUM: No.

THE COURT: Okay. And if the -- what conflict do you have?

MR. LUDLUM: Well, potentially there could be a conflict between the Sheriff and the County over who pays whatever judgment is entered in this case, if any.

THE COURT: That can be --

MR. LUDLUM: And this conflict --

THE COURT: What does that have to do -- what does that have to do with me inducing evidence at this point of today?

MR. LUDLUM: Perhaps nothing.

THE COURT: You need to understand, I'm not going to finish today.

MR. LUDLUM: Perhaps nothing, but we've got an ethical obligation --

THE COURT: Okay. Well, I'll tell you what we'll do. Mr. Rodriguez, do you want to get into this?

MR. RODRIGUEZ: Your Honor, may I address the Court?

THE COURT: Sure.

MR. RODRIGUEZ: Thank you. Excuse me. Your Honor, if I may recite the history of the case from the standpoint of representation briefly for the Court. Mr. Ludlum, at the direction of National Casualty or Scotsdale withdrew Sheriff Pippin's defense after Judge Belew's order, and I took over control of the case for a brief period of time.

The Plaintiff then amended their complaint. We renoticed Scotsdale, and then they instructed Mr. Ludlum to reinstate defense again. I perceive a problem because --

THE COURT: Problem with what?

MR. RODRIGUEZ: -- the fact that I did not have control of the litigation after Mr. Ludlum's firm re-entered the case, and although I believe that Mr. Ludlum's firm has done an outstanding job of representing Sheriff Pippin I might have made some different decisions concerning how we arrived here today; and I simply ask the Court to consider that perhaps because of all these potential ethical problems that may eventually result in some -- some legal problems in the -- in the way the case has been prepared and presented and things of that nature, Your Honor, that it might be best for a continuance to be granted until these matters can be --

THE COURT: What matters?

MR. RODRIGUEZ: The conflict --

THE COURT: What conflict?

MR. RODRIGUEZ: -- perceived by Mr.

Ludlum.

THE COURT: Okay. Do you perceive it?

MR. RODRIGUEZ: It becomes -- I'm beginning to perceive it, Your Honor.

THE COURT: What's the conflict that you perceive, Mr. Rodriguez?

MR. RODRIGUEZ: Well, that if -- if Mr. Ludlum's ethical loyalty was in fact to Archer County or is in fact to Archer County, or if he perceives that then perhaps some things should have been done differently for Sheriff Pippin for his protection in the preparation of the case?

THE COURT: What -- isn't that what you were for?

MR. RODRIGUEZ: Sir, I believe that I relinquished control of the litigation to Mr. Ludlum because they controlled the purse strings. Sheriff Pippin has little or no money, and I did that. I -- I stayed in reasonable contact with Mr. Ludlum.

THE COURT: What is -- what is a continuance going to do to solve those issues?

MR. RODRIGUEZ: I think at a minimum, Your Honor, we'll have a chance to explain to Sheriff Pippin all of this in the privacy of our law office and enter into consultations with Archer County and sort these matters out.

THE COURT: All right. Let me tell you what we're going to do, how we're going to do this. First of all, we're going -- let me say a few things for the record. The -- Mr. Ludlum undertook to represent the Sheriff in both capacities up through the 12(b)6 motion that was granted. He said

that there was an agreement to waive any conflict.

It's clear since he has to confer with Archer County officials, I'm taking that to mean that there has been no revocation of that agreement in the way of a conflict. I tell you what we can do. We are here, and I'm going to allow the Plaintiff to induce evidence. You may cross-examine. Mr. Ludlum may cross-examine.

And then if someone perceives that another lawyer needs to get involved in this to look out after someone's interest, those same witnesses can be subjected to cross-examination by the -- by the new lawyer, and that will cure any problem that anyone has with regard to -- to potential conflicts of interest, and it is clear to me that if -- if you cut through all the procedural niceties, Archer County's paying the freight as to Mr. Ludlum in the indirect sense. Well, the Sheriff hasn't paid any bills, has he, Counselor? You're staking your head no.

MR. LUDLUM: Just National Casualty Company, Your Honor.

THE COURT: And that's the policy that belongs to the county, Correct, which is to protect the Sheriff and protect the County from acts of their employees in their official capacity, correct?

MR. LUDLUM: Protect the Sheriff, Your Honor.

THE COURT: Yeah. Okay.

MR. LUDLUM: Let me make it clear, Your Honor. I don't -- I don't perceive a conflict with the Sheriff. I only have an obligation to let Archer County know that they may have exposure again.

THE COURT: Okay. Well, you can -- I'll tell you what, when we get through having our talk here, before we introduce any evidence, we'll take a 30-minute break, and you can go call whoever you think you need to call on the telephone and tell them what's going on here but --

MR. LUDLUM: Thank you.

THE COURT: -- what's going to happen is we are going to induce evidence today, and I am more than willing to give continuances of whatever duration is needed within reason to whoever because I do think it is unfair to come in thinking you're going to go in with one blueprint and it end up being another blueprint, but I am convinced in light of the Supreme Court decision that the blueprint needs to be changed.

And this woman's story is going to be the same no matter who's over here at this table representing whoever. Her story is going to be the same. She is going to have the same type of questions asked of her with regard to her credibility, with regard to what happened, no matter in whose capacity and who's representing what because I would rest assured that it is in Archer County and in the Sheriff individually. It's not in his best interest for me to believe a word the woman says. Would you agree with that? You're shaking your head yes, Mr. Ludlum, so I take that as a yes, so I see no harm that could befall the Defendant in either capacity or -- or the County by going ahead and proceeding that way, and if another lawyer needs to get involved and needs to come up and speak -- unless I -- unless I get hit by a bus or do something terrible I've got plenty of time. I'm not going anywhere, so -- so I think that's the way we need to proceed, but given the fact that you're from Austin, are you not, and these

lawyers are from Austin, and this woman is from Austin, and we're in Wichita Falls, I don't believe in giving litigants a continuance unless there's a real good reason to, and I haven't heard it today.

We're going to begin -- we're going to have to continue anyway, you know. When we planned it, when we had our pretrial discussions to continue this case until next Friday because it could not be finished today because of my schedule, and so this is what we're -- we're going to do. Now, right now what I'm going to is take a 30 -- do you want to have an opportunity to call whoever? Do you think that's necessary?

MR. LUDLUM: I think just a brief opportunity, Your Honor. I see the only difference between us proceeding with -- about Archer County is going to be a custom in policy.

THE COURT: That's on down the road, isn't it? I mean that's nothing to do with me or what I -- what I find the facts to be.

MR. LUDLUM: Yes, except that I just need to let Archer County know they now have exposure, potential exposure again --

THE COURT: Well, they may want --

MR. LUDLUM: -- let them know what the situation is. I think that's my ethical obligation, and that's all I'm saying.

THE COURT: Okay. So I'm clear on this. I'm not that well versed in all the nuances of local politics. Is Sheriff Pippin currently the Sheriff?

MR. LUDLUM: Yes, sir.

THE COURT: Okay. Okay. Why don't we take a break until 10:15, and we'll start

back up at 10:15.

MR. TUDDENHAM: Your Honor, if I could just ask one procedural question?

THE COURT: Yes.

MR. TUDDENHAM: Do you want to swear them all in at once or just --

THE COURT: I typically swear them in as -- as we take them unless the Rule is being invoked, which I imagine it will be, and if that's the case I would rather give them instructions as to the Rule at one sitting with a number of witnesses rather than go through the litany over and over an dover again so I guess the answer to your question is -- I would assume the Rule's going to be invoked, Mr. Ludlum?

MR. LUDLUM: Yes, sir.

MR. TUDDENHAM: Yes, sir.

THE COURT: Then have all of your witnesses here at 10:15 to be sworn and instructed as to the Rule, and we'll be in recess until 10:15 so that Mr. Ludlum can make the calls he wants to make.

(Recess from 9:45 a.m. to 10:35 a.m.)

THE COURT: We have been on a recess so that counsel for the Defendant could contact officials in Archer County. And it's my understanding from conversations that I've had back in chambers during this break, which has now lasted for 50 minutes, that Archer County officials and County Attorney in Archer County have been contacted as well as the insurance carrier.

I want the record to be clear, I'm not the one that brought up the matter of insurance, but anyway, that may -- I don't

know if that is because -- because of where we ar now, but that may be an issue perhaps for settlement negotiations -- but that's neither here nor there. It's none of the Court's business. I don't care to hear about that, but we've -- we've given the break that has been asked for, and again what I would like to reiterate for the record, regardless of the posture of the County and Sheriff, vis-a-vis one another, any insurance coverage that is available to pay any judgment with regard to whether a tort fee in an individual or official capacity, under 1983, all those sorts of issues seem to me to be on down the road.

What is clear to me, that no matter what capacity the Sheriff is being sued in with -- with the possible exception of the issue of custom and policy, the County's interests, the County's carrier interests, and the Sheriff's interests, are going to be perfectly in line in meeting the Plaintiff's evidence on every other issue it would seem to me, and that is, is that all Defendant -- all -- all interests that could be attributed to the Defendant from whatever source, I would anticipate is going to do everything they can to convince me that the Plaintiff's evidence is not worthy of belief.

So, with that, I see no harm in us going forward, and I want the record to be very clear that I am going to be extremely flexible in giving ample time for additional counsel to be brought in if that is deemed to be necessary and continuances to be granted since we're changing the blueprint as I mentioned here earlier at the last minute, but as I said, we're here. There's no good reason not to go ahead and begin to induce evidence at this time on the Plaintiff's claim with regard to the issue of liability if nothing else.

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX L

CLOSED

U.S. District Court
Northern District of Texas (Wichita Falls)

CIVIL DOCKET FOR CASE #: 92-CV-98

Bennett v. Pippin
Assigned to: Judge Joe Kendall
Demand: $0,000
Lead Docket: None
Dkt # in WD/TX Austin Div : is A-92-CA-401

Cause: 42:1983 Civil Rights Act

Filed: 09/11/92
Jury demand: Plaintiff
Nature of Suit: 440
Jurisdiction: Federal Question

ELLEN GAIL BENNETT
plaintiff

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v.

PRESLEY PIPPIN, JR, Individually, and as Sheriff of Archer County, in his official capacity (as Sheriff of Archer County, in his

Rosendo Rodriguez, Jr,
Attorney at Law
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[COR LD NTC]
Anderson & Rodriguez
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826 Scott Street

official capacity
deleted as per Order
dated 11/16/92 -
leaving Presley Pippin
Jr., Individually as
dft) (Presley Pippin
Jr., as Sheriff of
Archer County, in his
official capacity,
reinstated as per
oral order of Judge
Joe Kendall during
non-jury trial
02/10/95)
defendant

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James Norman Ludlum,
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5/30/92	1	COMPLAINT filed and one (1) summons(es) issued; Filing Fee $120.00; Receipt #207237; (dcf) [Entry date 09/17/92] [Edit date 09/18/92]
7/20/92	3	MOTION by Presley Pippin Jr to dismiss pursuant to FRCP 12(b) (dcf) [Entry date 9/17/92]
7/20/92	4	MEMORANDUM by Presley Pippin Jr in support of [3-1] motion to dismiss pursuant to FRCP 12(b) (dcf) [Entry date 09/17/92]
7/20/92	2	MOTION by Presley Pippin Jr with memorandum in support for protective order, and stay of discovery (dcf) [Entry date 09/18/92]
8/6/92	5	RESPONSE by Ellen Gail Bennett to [3-1] motion to dismiss pursuant to FRCP 12(b) (dcf) [Entry date 09/17/92]
8/6/92	6	MEMORANDUM by Ellen Gail Bennett in support of [5-1] motion response (dcf) [Entry date 09/17/92]
8/6/92	7	RESPONSE by Ellen Gail Bennett to [2-1] motion with memorandum in support for protective order, and stay of discovery (dcf) [Entry date 09/18/92]

8/12/92	8	SCHEDULING ORDER setting Joining of Parties on 11/10/92 ; Amending of Pleadings on 11/10/92; Bench trial set for <date not set>; Discovery cutoff 12/10/92; Deadline for filing of dispositive motions 12/10/92; Docket call set for <date not set>; Jury Trial set for <date not set>; Pretrial conference for 12/28/92; Pretrial materials due on 12/10/92 Proposed pretrial order due 1/9/93 ; Scheduling conference <date not set> ; Status conference <date not set> ; (signed by U.S. Dist Judge Sam Sparks) Copies to counsel: 08/12/92 Page(s): 3 (dcf) [Entry date 09/18/92]
8/20/92	9	ORDER GRANTING TRANSFER OF CASE to ND/TX (Signed by US District Judge Sam Sparks) (cf) [Entry date 09/17/92] [Edit date 09/18/92]
9/11/92	1	Original file, certified copy of transfer order and docket sheet received from District of WD/TX Austin Division (dcf) [Entry date 09/17/92]
11/16/92	--	**Address labels only (geb)

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CLOSED

11/16/92	9	ORDER denying [2-1] motion with memorandum in support for protective order, and stay of discovery; ORDERED that DFT's motion for protective order is OVERRULED; that Dft's objections to Pla's interrogatories #7 and #10 and Pla's Requests for Production #9, 1, 17 and 18 are OVERRULED; that Dft shall timely respond to the First Set of Interrogatories, First Request for Production, and Requests for Admissions propounded to Dft by Pla as requested by the Federal Rules of Civil Procedure (signed by Judge David O. Belew, Jr) Copies to counsel: 11/16/2 Page(s) 1 (slb) [Entry date 11/25/92]
11/16/92	10	ORDER granting in part, denying in part [3-1] motion to dismiss pursuant to FRCP 12(b); Motion to Dismiss is GRANTED as to the DFT in his official capacity and DENIED as to Dft in his individual capacity (signed by Judge David O. Belew, Jr) Copies to counsel: 11/16/92 Page(s) 4 (slb) [Entry date 11/25/92]
1/8/93	--	**Address labels only (geb)
1/8/93	11	ORDER SETTING TRIAL DATE AND SCHEDULING ORDER setting Discovery cutoff 5/28/93; Deadline for filing of dispositive motions 6/25/93; Jury Trial set for 9:30

		10/18/93; Pretrial conference for 10/13/93; Pretrial materials due on 10/13/93 Proposed pretrial order due 10/4/93; (signed by Judge David O. Belew, Jr.) Copies to counsel: 1/8/93 Page(s): 2 (slb) [Entry date 01/12/93]
2/24/93	12	MOTION by Presley Pippin Jr to compel Pla's responses to dfts' 1st and 2nd Set Interrogatories and 1st Set of Request for Production of Documents (slb) [Entry date 03/01/93]
3/3/93	13	MOTION by Presley Pippin Jr. to stay motion to compel (slb) [Entry date 03/05/93]
3/12/93	14	MOTION by Presley Pippin Jr for William W. Krueger III to withdraw as attorney wherein he states that Dft Pippin has been notified of his request and has retained other counsel (dcf) [Entry date 03/16/93]
3/15/93	15	RESPONSE by Ellen Gail Bennett to [14-1] motion for William W. Krueger III to withdraw as attorney wherein he states that Dft Pippin has been notified of his request and has retained other counsel (dcf) [Entry date 03/16/93]
3/16/93	--	**Address labels only (eds)
3/16/93	16	ORDER denying [14-1] motion for William W. Krueger III to withdraw as attorney

(signed by Judge David O. Belew, Jr.) Copies to counsel: 3/16/93 Page(s) 1 (slb) [Entry date 03/18/93]

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4/6/93	17	ORDER granting [13-1] motion to stay motion to compel (signed by Judge David O. Belew, Jr.) Copies to counsel: 04/06/93 Page(s) 1 (dvf) [Entry date 04/12/93]
4/8/93	--	**Address labels only (geb)
4/26/93	--	Received letter sent to Pla's atty back in mail marked, "Attempted, Not Known". Contacted atty by phone and advised to submit updated attorney address. Sent form along with previous mailing to new address (Wiseman, Durst & Tuddenham, 1004 West Ave., Austin, Texas 78701-2019) (slb)
4/27/93	18	MOTION by defendant Presley Pippin Jr for William W. Krueger III to withdraw as attorney (dcf) [Entry date 04/28/93]
4/29/93	19	RESPONSE by plaintiff Ellen Gail Bennett to [18-1] motion for William Krueger, III to withdraw as attorney (slb) [Entry date 05/03/93]

6/25/93	--	**Address labels only (geb)
6/25/93	20	ORDER setting Atty William W. Krueger III's motion to withdraw as counsel for defendant for Hearing on July 14, 1993 at 10:00 a.m., in the chambers of Judge Belew, 501 West 10th Street, Room 402, U.S. Courthouse, Fort Worth, Texas; copies mailed as directed (signed by David 01 Belew, Jr.) Copies to counsel: 06/25/93 Page(s) 2 (dcf) [Entry date 07/02/93]
7/14/93	--	**Address labels only (geb)
7/14/93	21	MOTION by defendant Presley Pippin Jr for brief continuance from the July 14, 1993 hearing date. (slb) [Entry date 07/20/93]
7/14/93	22	ORDER granting [21-1] motion for brief continuance, Motion hearing set for 1:30 07/20/93 for [18-1} motion for William W. Krueger, III to withdraw as attorney (signed by Judge David O. Belew, Jr.) Copies to counsel: 7/14/93 Page(s) 2 (slb) [Entry date 07/20/93]
7/14/93	--	**Added by defendant Presley Pippin Jr attorney Rosendo Rodriguez Jr (slb) [Entry date 07/20/93]
7/20/93	23	ORDER SETTING BRIEFING SCHEDULE...ORDERED that a supplement brief in opposition to William Krueger's Motion to withdraw

be filed by attorney Rosendo Rodriguez no later than 7/30/93. FURTHER ORDERED that a supplemental brief in support of the motion to withdraw be filed by the law firm of Ludlum & Ludlum no later than 7/30/93. (signed by Judge David O. Belew, Jr.) Copies to counsel: 7/21/93 Page(s) 2 (slb) [Entry date 07/21/93]

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7/30/93	24	SUPPLEMENTAL BRIEF RESPONSE by defendant Presley Pippin Jr in opposition to [18-1] motion for William W. Krueger, III to withdraw as attorney (dcf) [Entry date 08/02/93]
7/30/93	25	RESPONSE BRIEF BY LUDLUM & LUDLUM in support of [18-1] motion for William W. Krueger, III to withdraw as attorney (dcf) [Entry date 08/02/93]
8/17/93	--	**Address labels only (geb)
8/27/93	26	MOTION by Plaintiff Ellen Gail Bennett to compel (slb) [Entry date 09/02/93]
8/27/93	27	MEMORANDUM by plaintiff Ellen Gail Bennett in support of [26-1] motion to compel (slb) [Entry date 09/02/93]

8/30/93	--	**Address labels only (geb)
8/30/93	28	ORDER granting [18-1] motion for William W. Krueger, III to withdraw as attorney (Terminated attorney William Wayne Krueger III for Presley Pippin Jr (signed by Judge David O. Belew, Jr.) Copies to counsel: 08/30/93 Page(s) 2 (slb) [Entry date 09/02/93]
8/30/93	29	ORDERED that Dft shall have until 9/15/93 to obtain new counsel and notify the Court in writing by having counsel file a Notice of Appearance of Counsel. Further ORDERED that if dft proceeds pro se he should notify the Court in writing before 9/15/93 and provide current address and phone number. Failure to comply with this Order will result in a default judgment being taken against dft. Court notes that case is set for Jury trial 10/18/93 (signed by Judge David O. Belew, Jr.) Copies to counsel: 8/30/93 Page(s) 2 (slb) [Entry date 09/13/93]
9/3/93	--	RECEIVED GREEN CARD wherein it states that Orders #29 & #29 were received by the Defendant Pippin on 9/2/93 and signed for by Lindy Page as representatives of same (dcf) [Entry date 09/13/93]
9/9/93	--	RECEIVED LETTER ADDRESSED TO THE CLERK from Ludlum, & Ludlum, attorneys who have

been granted leave by the Court to withdraw as counsel for the defendant, Pippin, wherein they show by an attached facsimile sheet that the requested insurance policy which is the subject of the Pla's Mtn to Compel was provided to Plaintiff's counsel immediately upon receipt of the motion by the Ludlum firm; copy of letter provided to Judge; certificate of service shows that all parties were served by Ludlum firm (dcf) [Entry date 09/10/93]

9/10/93 -- **Address labels only (dcf)

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9/13/93 30 NOTICE of attorney appearance for defendant Presley Pippin Jr by Rosendo Rodriguez, Jr. (slb) [Entry date 09/14/93]

9/27/93 31 MOTION by plaintiff Ellen Gail Bennett to withdraw [26-1] motion to compel (slb)

9/30/93 -- **Address labels only (geb)

9/30/93 32 ORDER granting [31-1] motion to withdraw [26-1] motion to compel, withdrawing [26-1] motion to compel (signed by Judge David O. Belew, Jr.) Copies to counsel: 09/30/93

		Page(s) 1 (slb) [Entry date 10/01/93]
10/1/93	33	MOTION by defendant Presley Pippin to continue trial date set to begin on or about 10/18/93 (dcf) [Entry date 10/05/93]
10/1/93	34	MOTION by defendant Presley Pippin Jr. to extend discovery deadline and to allow the taking of oral depositions on behalf of the defendant; defendant Pippin asks that the discovery deadline be extended until November 15, 1993 (dvf) [Entry date 10/15/93]
10/4/93	35	UNFILED BY ORDER of 10/6/93 (dcf) [Entry date 10/05/93] [Edit date 10/15/93]
10/5/93	--	**Address labels only (geb)
10/5/93	36	ORDER granting [33-1] motion to continue trial date set to begin or about 10/18/93, reset scheduling order deadlines: Jury trial reset for 9:30 12/13/93 ; (signed by Judge David O. Belew, Jr.) Copies to counsel: 10/5/93 Page(s) 1 (slb) [Entry date 10/15/93]
10/6/93	--	**Address labels only (geb)
10/6/93	37	Order Unfiling Pleading by plaintiff Ellen Gail Bennett Re: Motion for Extension of Time to File Pre-Trial Order (Doc #35) Copies to counsel: 10/6/93 (signed by Judge David O. Belew Jr) Page(s) 1

(slb) [Entry date 10/15/93]

10/14/93 38 RESPONSE by plaintiff Ellen Gail Bennett Re: Motion for Extension of Time to File Pre-Trial Order (Doc #35) Copies to counsel: 10/6/93 (signed by Judge David O. Belew Jr) Page(s) 1 (slb) [Entry date 10/15/93]

10/15/93 -- **Address labels only (geb)

10/25/93 39 UNOPPOSED MOTION by plaintiff Ellen Gail Bennett to extend time to file pre-trial order (slb) [Entry date 10/27/93]

10/27/93 -- **Address labels only (geb)

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10/27/93 40 ORDER granting [39-1] motion to extend time to file pre-trial order, reset scheduling order deadlines: Proposed pretrial order due 12/3/93 (signed by Judge David I. Belew, Jr.) Copies to counsel: 10/27/93 Page(s) 1 (slb) [Entry date 11/02/93]

11/4/93 -- **Address labels only (mxm)

11/4/93 41 ORDER denying [34-1} motion to extend discovery deadline (signed by Judge David O. Belew, Jr.) Copies to counsel: 11/4/93 Page(s) 1

[Entry date 11/15/93]

11/15/93	--	**Terminated motion(s) (slb)
11/18/93	42	UNFILED PER JUDGE'S ORDER OF 11/29/93 (slb) [Edit date 12/01/93]
11/24/93	43	JOINT MOTION for continuance by plaintiff Ellen Gail Bennett, defendant Presley Pippin, Jr (slb)
11/29/93	44	Order Unfiling Pleading by plaintiff Ellen Gail Bennett Re: Motion for Leave to File 1st Amended Complaint (Doc #42) Copies to counsel: 12/1/93 (signed by Judge David O. Belew Jr) Page(s) 1 (slb) [Entry date 12/01/93]
11/29/93	--	**Terminated motion(s) (slb) [Entry date 12/23/93]
11/30/93	--	**Address labels only (geb)
12/2/93	--	**Address labels only (geb)
12/2/93	45	ORDER granting [43-1] joint motion for continuance, reset scheduling order deadlines: Jury trial reset for 10:00 3/14/94 ; (signed by Judge David O. Belew, Jr.) Copies to counsel: 12/2/93 Page (s) 1 (slb) [Entry date 12/16/93]
12/13/93	46	MOTION by plaintiff Ellen Gail Bennett for leave to file 1st Amended Complaint (slb) [Entry date 12/16/93]
12/13/93	47	MEMORANDUM by plaintiff

		Ellen Gail Bennett in support of [46-1] motion for leave to file 1st Amended Complaint (slb) [Entry date 12/16/93]
12/20/93	--	**Address labels only (geb)
12/20/93	48	ORDER granting [46-1] motion for leave to file 1st Amended Complaint (signed by Judge David O. Belew, Jr.) Copies to counsel: 12/20/93 Page(s) 1 (slb) [Entry date 12/23/93]
12/20/93	49	FIRST AMENDED COMPLAINT by plaintiff Ellen Gail Bennett, (Answer due 12/30/93 for Presley Pippin Jr) amending [1-1] complaint (slb) [Entry date 12/23/93]

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1/13/94	--	**Address labels only (geb)
2/17/94	50	UNFILED PER JUDGE'S ORDER OF 2/22/94 (slb) [Entry date 02/23/94] [Edit date 02/23/94]
2/22/94	51	Order Unfiling Pleading by defendant Presley Pippin Jr Re: Motion to Substitute Atty & Continuance (Doc #50) Copies to counsel: 2/23/94 (signed by Judge David O. Belew Jr) Page(s) 1 (slb) [Entry date 02/23/94]

2/28/94	52	RESPONSE by plaintiff Ellen Gail Bennett to [50-1] motion for continuance and [50-2] motion to substitute attorney (NOTE: document pla is responding to was unfiled by the Court's Order dated 2/22/94) (dcf) [Entry date 03/02/94]
3/2/94	53	MOTION by defendant Presley Pippin Jr to continue, and to substitute James Ludlum Jr. for Rosendo Rodriguez, Jr. (dcf)
3/4/94	--	**Address labels only (geb)
3/4/94	54	ORDER granting [53-1] motion to continue jury trial; trial continued and reset as the No. 1 case for trial on July 18, 1994, granting [53-2] motion to substitute James Ludlum, Jr. as lead counsel for Rosendo Rodriguez, Jr. who will remain "Of Counsel"; (signed by Judge David O. Belew, Jr.) Copies to counsel: 03/04/94 Page(s) 2 (dcf) [Entry date 03/09/94]
3/4/94	54	SCHEDULING ORDER setting Jury trial for 10:00 7/18/94; Pretrial materials due on 7/13/94 Proposed pretrial order due 7/1/94; the parties are instructed to forward copies of pretrial materials to the Court's Fort Worth address, further a copy of the Plaintiff's and Defendant's Proposed Jury Instructions

shall be supplied to the Court on 3.5 diskettes in WordPerfect 5.1, or compatible format, and the same shall be sent to the Court's Fort Worth, Texas Office on or before Wednesday, July 13, 1994; all other previously imposed deadlines shall remain closed (signed by Judge David O. Belew, Jr.) Copies or counsel: 03/04/94 Page (s): 2 (dcf) [Entry date 03/09/94]

5/4/94	55	MOTION by defendant Presley Pippin, Jr to reopen discovery (slb)
5/9/94	56	RESPONSE by plaintiff Ellen Gail Bennett to [55-1] motion to reopen discovery (slb)
5/9/94	--	**Address labels only (geb)
5/18/94	57	MOTION by defendant Presley Pippin Jr for leave to file Reply to Response to Motion to reopen discovery out of time (slb) [Entry date 05/26/94]

5/18/94	58	REPLY by defendant Presley Pippin Jr to response to [55-1] motion to reopen discovery (slb) [Entry date 05/26/94]

5/19/94	--	**Address labels only (geb)
5/19/94	59	ORDER granting [57-1] motion for leave to file Reply to Response to Motion to reopen discovery out of time (signed by Judge David O. Belew, Jr.) Copies to counsel: 5/19/94 Page(s) 1 (slb) [Entry date 05/26/94]
5/23/94	--	**Address labels only (geb)
5/23/94	60	ORDER granting [55-1] motion to reopen discovery, reset discovery due for 6/27/94 (signed by Judge David O. Belew, Jr.) Copies to counsel: 5/23/94 Page(s) 1 (slb) [Entry date 05/26/94]
6/1/94	61	MOTION by plaintiff Ellen Gail Bennett for reconsideration of [60-1] order reopening of discovery (slb) [Entry date 06/02/94]
6/6/94	--	**Address labels only (geb)
6/6/94	62	ORDER, shortening time for response and reply to plaintiff's motion to reconsider the order reopening of discovery; def's resp to be filed no later than 6/10/94 (signed by Judge David O. Belew, Jr.) Copies to counsel: 06/06/94 Page(s) 1 (dcf) [Entry date 06/14/94]
6/13/94	63	RESPONSE by defendant Presley Pippin Jr to [16-1] motion for reconsideration of [60-1] order reopening of discovery (dcf) [Entry date

06/28/94]

6/16/94 64 REPLY by plaintiff Ellen Gail Bennett to response to [16-1] motion for reconsideration of [60-1] order reopening of discovery dcf) [Entry date 06/28/94]

6/17/94 65 NOTICE of oral deposition of plaintiff by defendant Presley Pippin Jr, 1:00 p.m., June 22, 1994, Austin, TX (See Notice for specifics) (dcf) [Entry date 06/28/94]

6/21/94 -- **Address labels only (geb)

6/21/94 66 UNFILED AS PER JUDGE'S ORDER OF 06/24/94 (dcf) [Entry date 06/28/94] [Edit date 07/04/94]

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6/21/94 67 ORDER...MODIFYING ORDER REOPENING DISCOVERY the Court will allow the defendant to depose the plaintiff about the events giving rise to her claims; this depo may last no longer than 2 hours of actual questioning; the defendant may not engage in any other form of discovery with the plaintiff (signed by Judge David O. Belew, Jr.) Copies to counsel: 06/21/94 Page(s) 2 (dcf) [Entry date

06/28/94]

6/22/94	68	MOTION by plaintiff Ellen Gail Bennett for protective order (dcf) [Entry date 06/28/94]
6/23/94	--	**Address labels only (geb)
6/23/94	70	ORDER denying [68-1] motion for protective order (signed by Judge David O. Belew, Jr.) Copies to counsel: 06/23/94 Page (s) 1 (dcf) [Entry date 06/30/94]
6/24/94	--	**Address labels only (eds)
6/24/94	69	SECOND AMENDED NOTICE for oral and videotaped deposition of deposition by defendant Presley Pippin Jr; 2:00p, 6-24-94, Austin, TX (dcf) [Entry date 06/28/94]
6/24/94	71	Order Unfiling Pleading by defendant Presley Pippin Jr. Re: Reply of Deft to Plaintiff's Reply to Defendant's Response to Plaintiff's Motion to Reconsider the Order Reopening Judge David O. Belew Jr) Page(s) 3 (dcf) [Entry date 07/04/94]
7/1/94	--	SENT PRETRIAL ORDER TO JUDGE (THE ORIGINAL + ONE) TO JUDGE FOR REVIEW AND SIGNATURE (dcf) [Entry date 07/04/94]
7/13/94	--	**Address labels only (geb)
7/13/94	72	ORDER, FOR ARBITRATION wherein it is ORDERED that

this case be arbitrated on August 31 and September 1, 1994 for a period not to exceed one and one-half days in Austin, Texas before a panel of three lawyers who have been selected by agreement of counsel; each party shall have 5 hours each to present his or her respective evidence (see Order for further specifics) (signed by Judge David O. Belew, Jr.) Copies to counsel: 07/13/94 Page(s) 4 (dcf) [Entry date 07/18/94]

7/13/94 73 ORDER, CLOSING CASE ADMINISTRATIVELY, and giving each party the option to reopen the case without prejudice upon the motion of either party; this right shall continue until 30 days after the arbitration proceedings are concluded (signed by Judge David O. Belew, Jr.) Copies to counsel: 07/13/94 Page(s) 2 (dcf) [Entry date 07/18/94]

7/13/94 -- Case closed (dcf) [Entry date 07/18/94]

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10/21/94 74 SEALED DOCUMENT placed in sealed area (eat) [Entry date 10/25/94]

10/21/94 75 MOTION by defendant Presley

		Pippin Jr to reopen suit (eat) [Entry date 10/25/94]
10/21/94	76	NOTICE of appeal to United States District Court from October 12, 1994, award of arbitrators. by defendant Presley Pippin Jr (appeal fee in the amount of $105.00 was submitted (ck #13459) and subsequently returned to James Ludlum, Attorney) (eat) [Entry date 10/25/94]
11/10/94	77	NOTICE of appeal to the U.S. District Court by defendant Presley Pippin Jr from October 12, 1994, Award of Arbitrators; NOTE: an envelope containing the Award of Arbitrators was received in this office as sealed matter; a copy of same was transmitted to the Judge under seal (eat) [Entry date 11/16/94]
1/5/95	78	ORDER granting [75-1] motion to reopen suit; case is reopened and will be set for a non-jury trial de novo at the convenience of the Court in Wichita Falls, TX (signed by Judge Joe Kendall) Copies to counsel: 01/05/95 Page(s) 1 (dcf) [Entry date 01/11/95]
1/5/95	--	Case reopened (dcf) [Entry date 01/11/95]
1/5/95	--	CASE reassigned to Judge Joe Kendall (dcf) [Entry date 01/11/95]
1/6/95	--	**Address labels only (cxb)

1/9/95	--	Copy file compiled and sent to Chambers, with up-to-date docket entries (dcf) [Entry date 01/11/95]
1/19/95	--	**Address labels only (cxb)
1/19/95	79	ORDER...this case is set on the Court's Non-Jury trial docket for Wednesday, February 8, 1995, at the Federal Courthouse in Wichita Falls, Texas; a pretrial conference is scheduled for 4:30 p.m. on Monday, February 6, 199, at the Federal Courthouse in Wichita Falls, Texas (signed by Judge Joe Kendall) Copies to counsel: 01/19/95 Page(s) 1 (eat) [Entry date 01/23/95]
1/27/95	80	MOTION by defendant Presley Pippin Jr for continuance (eat)
1/31/95	81	MOTION by defendant Presley Pippin Jr to quash and for protective order (eat)
2/1/95	--	**Address labels only (cxb)
2/1/95	82	RESPONSE by plaintiff Ellen Gail Bennett in opposition to [80-1] motion for continuance (eat)

2/1/95	83	ORDER denying defendant's

		[80-1] motion for continuance (signed by Judge Joe Kendall) Copies to counsel: 02/01/95 Page(s) 1 (eat) [Entry date 02/03/95]
2/2/95	85	ORDER denying [81-1] motion to quash and for protective order which was filed January 31, 1995 (signed by Judge Joe Kendall) Copies to counsel: 02/03/95 Page(s) 1 (eat) [Entry date 02/06/95]
2/3/95	--	**Address labels only (LEAD) (cxb)
2/3/95	84	RESPONSE by plaintiff Ellen Gail Bennett in opposition to [81-1] motion to quash (eat)
2/7/95	86	MOTION by defendant Presley Pippin Jr to dismiss for lack of subject matter jurisdiction (eat)
2/7/95	87	MEMORANDUM (BRIEF) by defendant Presley Pippin Jr. in support of [86-1] motion to dismiss for lack of subject matter jurisdiction (eat)
2/7/95	88	Proposed findings of fact and conclusion of law by plaintiff Ellen Gail Bennett (eat)
2/7/95	98	Minute order: re, 3:00 p.m. Pretrial conference held before Judge Joe Kendall; Tuddenham and Kolker appear on behalf of the plaintiff; Rodriguez and Ludlum appear in behalf of the defendant

(dcf) [Entry date 0227/95]

2/8/95	89	ORDER denying [86-1] motion to dismiss for lack of subject matter jurisdiction (signed by Judge Joe Kendall) Copies to counsel: 02/08/95 Page(s) 1 (dcf)
2/10/95	90	NOTICE OF FILING OF DEPOSITION OF JO ANN BRADSHAW by attorneys for plaintiff (eat)
2/10/95	91	Witness list by plaintiff Ellen Gail Bennett (eat)
2/10/95	92	DEFENDANT'S CHRONOLOGY OF EVENTS by defendant Presley Pippin Jr (eat)
2/10/95	93	Witness list by defendant Presley Pippin Jr (eat)
2/10/95	94	Exhibit list by defendant Presley Pippin Jr (eat)
2/10/95	95	DEFENDANT'S MEMORANDUM OF LAW by defendant Presley Pippin Jr (eat)
2/10/95	96	Proposed findings of fact and conclusions of law by defendant Presley Pippin Jr (eat)

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2/10/95	102	Minute order: non-jury trial held before Judge Joe

		Kendall Court Reporter: Mary Twomey; CSO Loyd Taylor, cnsl for pla, Tuddenham & Kolker, cnsl for deft, Rodriguez and Ludlum; opening statements and testimony of 2 witnesses; oral order from the bench vacating Order entered on 11/16/92 and reinstating Presley Pippin, Jr. as defendant individually in his official capacity as Sheriff of Archer County, Texas (dcf) [Entry date 02/27/95]
2/17/95	103	Minute order: non-jury trial held before Judge Joe Kendall Court Reporter: Debbie Roberts; non-jury trial continued from 2/10/95; cnsl for pla, Tuddenham & Kolker; cnsl for deft, Ludlum & Kyle' 5:35 Court recesses, judgment to be entered (dcf) {Entry date 02/27/95]
2/23/95	97	Proposed findings of fact and conclusions of law by defendant Presley Pippin Jr (eat)
2/24/95	99	PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW () (dcf) [Entry date 02/27/95]
2/27/95	100	FINDINGS OF FACT AND CONCLUSIONS OF LAW (signed by Judge Joe Kendall) Copies to counsel: 02/27/95 Page(s): 12 (dcf)
2/27/95	101	FINAL JUDGMENT for plaintiff

		Ellen Gail Bennett against defendant Presley Pippin Jr; plaintiff is to recover from defendant and Archer County, Texas, jointly and severally, the compensatory damage in the amount of $1,000,000.00 plus future interest at the statutory rate of 7.03% until paid; FURTHER ORDERED that plaintiff Ellen Gail Bennett recover from defendant, Presley Pippin individually, the punitive damage amount of $1,000,000.00 plus future interest at the statutory rate of 7.03% until paid; FURTHER ORDERED that all costs of court shall be assessed against the Defendant and Archer County, Texas jointly and severally (signed by Judge Joe Kendall) Copies to counsel: 02/27/95 Page(s): 2 (dcf)
2/27/95	--	Case closed (dcf)
2/28/95	--	**Address labels only (cxb)
3/7/95	104	MOTION by plaintiff Ellen Gail Bennett for attorney fees with affidavit of Thomas Kolker attached (eat)
3/7/95	105	MOTION by plaintiff Ellen Gail Bennett to alter (modify) judgment (eat)
3/9/95	106	TRANSCRIPT from the trial before the Honorable Joe Kendall on February 10, 1995, 10:00 a.m.; Court Reporter: Mary Twomey Date(s): 02/10/95 Volume(s):

1 Type of proceeding trial (eat) [Entry date 03/10/95]

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3/15/95	107	MOTION by defendant Presley Pippin Jr in his individual capacity for new trial, to vacate [101-1] judgment order (dcf)
3/15/95	108	MOTION to intervene by movant Archer County Texas copy of pleading sent to Judge for his perusal, certificate of conference is being fed exed to this office and the proposed order was sent to the Judge's Chambers with his complimentary copy of the motion; NOD was pulled as per Rynn (dcf)
3/15/95	109	MOTION by defendant Presley Pippin Jr in his official capacity as Sheriff of Archer County, Texas for new trial with incorporated brief in support (dcf)
3/15/95	110	TRANSCRIPT filed Court Reporter: Debbie Roberts taken before the Honorable Joe Kendall, United States District Judge in Wichita Falls, Texas Date(s): 02/17/95 Volume(s): 2 of 2 Type of proceeding: Non-Jury Trial (dcf)

3/15/95	132	MOTION by movant Archer County Texas for new trial and incorporated brief in support; NOTE: although there was an order dated 04/03/95, doc #116, ruling on this motion, the motion itself was inadvertently overlooked because the Clerk's Office felt that it needed the Judge's permission to file, however, under FRCP Rule 24c permission was not appeal record (second supplement) (eat) [Entry date 07/24/95]
3/16/95	111	CERTIFICATE OF CONFERENCE by movant Archer County Texas Re: Motion to Intervene (eat) [Entry date 03/20/95]
3/24/95	112	MOTION by plaintiff Ellen Gail Bennett to extend time (eat)
3/27/95	--	**Address labels only (ldm)
3/27/95	113	ORDER, in light of the parties' agreement to attempt to mediate this case on March 31, 1995, it is hereby ORDERED that responses to the various post-trial motions currently pending before the Court, including the motion of Archer County to intervene, are hereby stayed; it is further ORDERED that, in the event that the mediation is unsuccessful, the parties shall have until April 0, 1995 to file responses to the post-judgment motions currently pending before the

Court (signed by Judge Joe Kendall) Copies to counsel: 03/27/95 Page(s) 2 (eat) [Entry date 03/28/95]

4/3/95 114 ORDER denying defendant's [109-1] motion, in his official capacity, for new trial (signed by Judge Joe Kendall) Copies to counsel: 04/04/95 Page(s) 1 (eat) [Entry date 04/06/95]

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CLOSED

5/3/95 -- Notice of appeal and certified copy of docket to USCA: [124-1] appeal (eat)

5/5/95 -- USCA Case Number, 95-10380 Re: [124-1] appeal, 95-10380 Re: [122-1] appeal, 95-10380 Re: {121-1] appeal (dcf)

5/5/95 125 Subsequent (SECOND AMENDED) NOTICE OF APPEAL by defendant Presley Pippin Jr in his individual capacity and his official capacity as Sheriff of Archer County, Texas; wherein the appellant appeals the following: Final Judgment of USDC and Findings of Fact and conclusion of Law of USDC; Order denying indiv motion for vacate judgment, and for new trial, USDC; Order denying official deft's motion for new trial, USDC; Order denying Archer County,

		Texas motion to intervene, USDC; Order awarding attorneys fees, USDC; Order modifying judgment, USDC; re: [124-10 appeal (dcf)
5/5/95	--	Notice of appeal and certified copy of docket to USCA: [125-1] modifier appeal (dcf)
5/8/95	126	Transcript order form: Transcript not requested [121-1] appeal; transcript is already on file in Clerk's officer (eat) [Entry date 05/09/95
5/10/95	127	THIRD AMENDED NOTICE OF APPEAL by defendant Presley Pippin Jr., in his individual capacity and his official capacity as Sheriff of Archer County, Texas re: February 10, 1995, Order Vacating November 16, 1992, Order of Honorable David O Belew that dismissed the Official Capacity Claim against Defendant and Which Reinstated the Official Capacity Claim against Archer County, Texas, Sheriff Presley Pippin, Jr., In His Official Capacity at the Onset of Trial; Findings of Fact and Conclusions of Law which were entered in February 27, 1995; Final Judgment of the US District Court entered on February 27, 1995; Order Denying Individual Defendant's Motion to Vacate Judgment, and For New Trial of the US District Court entered on

April 3, 1995; Order denying Official Defendant's Motion for New Trial of the US District Court entered on April 3, 1995; Order Denying Archer County, Texas' Motion to Intervene entered on April 3, 1995 entered on April 3, 1995; Order Awarding Attorneys' Fees entered on April 13, 1995; Order Modifying Judgment entered on April 12, 1995; Fee payment amount: $105.00 Receipt # 16567 Appeal record due on 5/25/95 (eat) [Entry date 05/11/95]

5/11/95 -- **Address labels only (eat)

5/11/95 -- Notice of appeal and certified copy of docket to USCA: [127-1] appeal (eat)

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5/12/95 128 Transcript order form: Transcript not requested [127-1] appeal; transcript is already on file in Clerk's office (eat)

5/17/95 -- Transmitted record on appeal to U.S. Court of Appeals: [127-1] appeal record consisted of three volumes of case papers, two volumes of transcripts labeled "B", "C" and certified copy of up-to-date docket entried bearing the NO# 95-10380

		(eat)
5/17/95	--	**Address labels only (eat)
5/18/95	--	RECEIVED letter addressed to Clerk USCA5 from attorney Darrell G-M Noga wherein he includes a Form for Appearance of Counsel which includes an Application and Oath for Admission of Peter M. Roossien to the Fifth Circuit Bar (eat) [Entry date 05/30/95]
5/22/95	--	TRANSMITTED one envelope of sealed matter to USCA5 (Award of Arbitrators) inadvertently left out on first mailing of appeal record (eat)
5/22/95	--	**Address labels only (eat)
5/26/95	--	RECEIVED a $105.00 fee for the Second Amended Notice of Appeal of Defendant Pippin; received from the firm of Ludlum & Ludlum (eat) [Entry date 05/30/95]
5/26/95	129	ABSTRACT OF JUDGMENT issued (4) against defendant Presley Pippin Jr in the amount of $2,399,192.48, along with interest at the rate of 7.03 per cent per annum from the 27th day of February, 1995 (eat) [Entry date 05/30/95]
5/26/95	130	Transcript order form: Transcript not requested; transcript is already on file in Clerk's Office; signed by Deborah M.

		Roberts, Court Reporter (eat) [Entry date 05/30/95]
7/12/95	131	NOTICE of FILING OF VOLUNTARY PETITION IN BANKRUPTCY by defendant Presley Pippin Jr (eat) [Entry date 07/13/95]
7/13/95	--	Transmitted supplemental record on appeal: [127-1] appeal record consisted of one volume of case papers and a certified copy of up-to-date docket entried bearing the NO#95-10380 (eat)
7/13/95	--	**Address labels only (eat)
7/20/95	133	SUGGESTION OF BANKRUPTCY by defendant Presley Pippin Jr (eat) [Entry date 07/24/95]
8/3/95	--	Transmitted second supplemental record on appeal: [127-1] appeal record consisted of one volume of case papers and a certified copy of up-to-date docket entries bearing the NO#95-10380 (eat)

INTERNAL USE ONLY: Proceedings include all events. 7:92cv98 Bennett v. Pippin
CLOSED

8/3/95	--	**Address labels only (eat)
9/7/95	--	**Terminated document #107, #143 as per law clerk Rynn Frieling (eat)
12/7/95	--	**Terminated document #112

		as per Rynn Frieling (eat)
1/29/96	134	O R D E R , S E T T I N G S T A T U S / S E T T L E M E N T CONFERENCE...in light of the January 24, 1996 decision by the USCA5 appellant number 95-10380, remaning a portion of this case for a new trial, the Court hereby ORDERS that a status conference is set in this matter on February 14, 1996 at 2:00 p.m. in the courtroom at the Federal Courthouse in Wichita Falls, Tx ; all persons necessary to the decision to settle the remainder of this case shall be present at this conference, either with or without counsel (signed by Judge Joe Kendall) Copies to counsel: 02/01/96 Page(s) 1 (eat) [Entry date 02/01/96]
1/30/96	--	**Address labels only (LEAD) (tsp)
1/30/96	135	AMENDED ORDER, setting status/settlement conference on February 15th at 2:00 p.m. in the courtroom at the Federal Courthouse in Wichita Falls, Texas (signed by Judge Joe Kendall) Copies to counsel: 01/31/96 Page(s) 1 (dcf) [Entry date 02/02/96]
2/8/96	136	ORDER...it is hereby ORDERED that the scheduling/status conference currently set in this case for 2:00 p.m. 2/15/96, is RESET to 4:45 on 2/15/96 in Hon Joe Kendall's

		second floor courtroom at the Federal Courthouse in Wichita Falls, Texas (signed by Judge Joe Kendall) Copies to counsel: 02/08/96 Page(s) 1 (dcf)
2/15/96	137	Minute order: Status Conference on issues on remand from USCA5 held before Judge Joe Kendall Court Reporter: Linda Robbins; attorneys Tuddenham, Kolker, Ludlum and Roossien were present (eat) [Entry date 02/21/96]
3/13/96	138	OPINION OF USCA (certified copy) in accordance with USCA judgment re: [121-1] appeal (eat) [Entry date 03/18/96]
3/13/96	139	JUDGMENT OF USCA (certified copy) Re: [121-1] appeal; ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by the Court that the judgment of the District Court in this cause is affirmed in part, reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court; FURTHER ORDERED that each party bear its own costs on appeal Issued as mandate on 03/11/96 (eat) [Entry date 03/18/96]
3/13/96	--	**Address labels only (eat) [Entry date 03/18/96]

NON-PUBLIC

INTERNAL USE ONLY: Proceedings include all events. 7:92cv98 Bennett v. Pippin
CLOSED

3/13/96	--	Record on appeal returned from U.S. Court of Appeals: [122-1] appeal record consisted of seven volumes of case papers and one envelope (eat) [Entry date 03/18/96]
3/13/96	--	**Remove appeal flag - no further appeals pending (eat) [Entry date 03/18/96]

Supreme Court, U.S.
FILED
JUL 2 1996
CLERK

No. 95-1944

In The

Supreme Court of the United States

October Term, 1995

PRESLEY L. PIPPIN, JR.

Petitioner,

vs.

ELLEN GAIL BENNETT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

EDWARD TUDDENHAM
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WISEMAN, DURST,
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1004 West Avenue
Austin, Texas 78701
(512) 479-5017

13 pp

QUESTIONS PRESENTED

1. Whether the nexus analysis used by the Fifth Circuit Court of Appeals is appropriate to determine whether an action was taken under color of law pursuant to 42 U.S.C. § 1983.

2. Whether the right to due process under the Fifth Amendment to the United States Constitution is violated in a damage suit prosecuted under 42 U.S.C. § 1983, when, on the morning of trial, the District Court, without prior notice, reinstates long-since dismissed official capacity claims against a defendant, and then insists throughout trial that his attorneys, over their repeated objections that they cannot do so, represent the defendant in both his individual and official capacities, despite conflicts of interest between those two positions.

3. Whether a federal civil litigant is deprived of due process under the Fifth Amendment to the United States Constitution when the trial court shows bias and prejudice against the defendant that affected the outcome throughout the bench trial of the damage suit case.

4. Whether attorneys' fees and expenses awarded to Respondent impermissibly amounted to a windfall for Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1944

PRESLEY L. PIPPIN, JR.,

Petitioner,

v.

ELLEN GAIL BENNETT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 74 F.3d 578 (5th Cir. 1996) and appears as Appendix A of the Appendix to the Petition. The opinion of the District Court is unreported and appears as

Appendix F of the Appendix to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1996. A timely Petition for Rehearing was denied on March 1, 1996 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a civil rights action filed pursuant to 42 U.S.C. § 1983. In her complaint, Respondent Ellen Gail Bennett alleged that Petitioner Presley Pippin, Jr., acting individually and in his official capacity as Sheriff of Archer County, Texas, sexually assaulted her and thereby deprived her of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. After a bench trial, the district court entered judgment in favor of Respondent Bennett. The court held Pippin liable in his individual capacity and in his official capacity (i.e. against Archer County, Texas) for $1,000,000 in compensatory damages and $133,235 in attorneys fees. The court assessed $1,000,000 in punitive damages against Pippin, individually.

On appeal, Court of Appeals for the Fifth Circuit, upheld the district court's finding that Pippin's actions were taken under color of state law and affirmed the judgment against Pippin, individually, in all respects. The court found that the County had been denied its right to a jury trial when the official capacity claims against Pippin were reinstated the morning of the trial. Accordingly, the court remanded those claims for a new trial.

The findings of fact and conclusions of law entered by the district court and affirmed on appeal reveal that on the evening of July 2, 1990, Respondent Bennett shot her husband in the chest during the course of a domestic dispute. Ms. Bennett then drove to Wichita Falls, Texas to obtain help for her husband. She was detained by the Wichita Falls Police until Petitioner Pippin came to take custody of her. Pippin turned Ms. Bennett over to his deputies who took her to the Archer County Sheriff's Office and obtained a statement from her regarding the shooting. Ms. Bennett was then asked not to leave the county without the authorization of the Sheriff's office and taken back to her home in the early morning hours of July 3. Shortly thereafter, Pippin, who was still on duty, arrived at Bennett's home and began questioning her about the shooting incident. When the Sheriff touched her in an inappropriate way, she asked him to leave. Bennett then went to bed. The next thing she knew, Pippin was standing over her taking her clothes off. When she protested, Pippin responded that he was the Sheriff and could therefore do what he pleased. When she persisted in objecting, the Sheriff stated, "What are you complaining about? I could have thrown you in jail and sorted it out later." The Sheriff then raped Ms. Bennett.

Several days later, the Sheriff gave Ms. Bennett permission to leave the County and she moved to Austin, Texas. Over the next several months, the Sheriff repeatedly called Bennett to inform her of the pending grand jury proceedings regarding the shooting of her husband and to inquire whether she had told anyone about the rape. When the grand jury finally no-billed her, Ms. Bennett reported the rape to the Austin Police Department.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and none of the questions presented for review involves a conflict with a decision of any other court of appeals or of this Court. The court of appeals decision represents the application of established legal principals to a highly fact specific situation. Accordingly, review by this Court is not warranted.

1. Petitioner contends that the "nexus" standard used by the court of appeals to determine that Pippin acted under color of law is in conflict with the Tenth Circuit's decision in *D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176 (10th Cir. 1990), as well as the analysis of several other circuit courts of appeal. This is simply not the case.

D.T., 894 F.2d at 1188, like this case and a similar Fifth Circuit case, *Doe v. Taylor I.S.D.*, 15 F.3d 443, 452 n.4 (5th Cir. 1994) (en banc) *cert. denied* 115 S.Ct. 70 (1994), recognizes that where there is a "real nexus" between the activities out of which a violation occurs and the official's duties and obligations as a state actor, the official's conduct satisfies the under color of law standard. The difference between *D.T.* and this case lies not in the standard applied but in the facts of the case. In *D.T.* no nexus was found between the sexual assault and the defendant's official duties because the assault and all of the activities leading up to it occurred while the defendant teacher was on summer vacation engaged in non-public school activities. *Id.* at 1186-87. Here, by contrast, the Sheriff was very much on duty at the time of the incident. As the district court recognized, "the entire incident with the Plaintiff arose out of the sheriff's official duties investigating the shooting of Tony Bennett." App. F, Conclusions of Law ¶ 2. The Sheriff met Ms. Bennett and

became aware of her vulnerable position by virtue of his position as the chief law enforcement officer investigating the shooting. He used his position as sheriff to determine that Tony Bennett would remain in the hospital overnight (and thereby ensured that he would be alone with Ms. Bennett), and to control Ms. Bennett's freedom. Moreover, he both implicitly and explicitly used his official power to intimidate her and guarantee her silence about the assault. As the court of appeals noted, under the circumstances of this case "we cannot argue with the district court's observation that 'it was not lost on Gail Bennett (or the Sheriff) that the Sheriff carried the keys to the Archer County Jail with him in his pocket and wielded coercive power over Gail Bennett." App. A. This kind of "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." *U.S. v. Classic*, 313 U.S. 299, 326 (1941).

Petitioner's quote from *D.T.*, 894 F.2d at 1197, to the effect that there must be authorization or approval of the government entity, Pet. at 15, does not establish a different legal standard from that used by the Fifth Circuit. Read in context, that quote refers to what must be shown to establish liability by a governmental entity -- a very different question from what must be shown to establish that a particular individual acted under color of law. The Tenth Circuit's standard for determining color of law, expressed on the following page of its opinion, is in no way in conflict with the Fifth Circuit's standard. *Compare D.T.*, 897 F.2d at 1188 *with Doe*, 15 F.3d at 452 n. 4.

Nor does the Fifth Circuit's nexus standard conflict with any of the other cases cited by Petitioner. To the

contrary, both *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981), and *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994), apply standards similar to the standard used in this case. Different results obtained simply because the facts of those cases demonstrated that the conduct at issue arose out of and was effectuated through purely personal interactions which had no nexus with any official position or abuse of official power. Here, by contrast, even if the Sheriff's motive for assaulting Ms. Bennett was a personal one, he used the power of his office to accomplish that goal.

The "color of law" question is a highly fact bound one that may not be amenable to more precise legal formulations than the standard definition established long ago in *U.S. v. Classic*, 313 U.S. 299, 326 (1941), and *Screws v. U.S.*, 325 U.S. 91, 111 (1944). The standard articulated by the Fifth Circuit in this case comports with the definition of "under color of law" in those decisions and simply represents an unremarkable application of that definition to the unique facts of this case. In such circumstances, review by this Court is not warranted.

2. Petitioner seeks certiorari to review the question of whether Petitioner was deprived of due process when the trial court required his attorney to represent the County's as well as Petitioner's interests at trial. It is not at all clear that Petitioner Pippin has preserved this issue for review. In his appeal brief, Pippin argued that the reinstatement of the official capacity claims on the eve of trial denied him due process *in his official capacity* (i.e. denied the County due process). He did not appear to argue that the reinstatement of the claims against the County prejudiced him, individually. The court of appeals apparently did not view Pippin, individually, as asserting a due process violation (or found

such an assertion to be frivolous) since it did not discuss such a claim in its opinion. The only discussion of a due process violation was with respect to the County and its assertion that it was denied a jury trial.

Even if the Petitioner has preserved a due process issue for review, he presents no reason why this Court should expend its resources on that question other than to correct alleged error in this particular case. Petitioner cites no conflict in the legal standard for determining whether a conflict of interest exists. He simply argues that, in this particular case, the court of appeals ignored its own standard set forth in *Van Ootegham v. Gray*, 628 F.2d 488, 495 n. 7 (5th Cir. 1980). Even if such error had occurred, that, by itself would not be a proper basis for granting certiorari..

Moreover, there was no error committed when Petitioner's attorney was directed to represent the County's interests, as well as Petitioner's, at trial. To be sure, having one attorney represent both an individual defendant and a government entity in a Section 1983 case can lead to a conflict of interest where the individual defendant admits to acting under color of law but the government entity denies that allegation. *See, e.g. Dunton v. County of Suffolk*, 729 F.2d 903, 907-909 (2d Cir.) *vacated in part on other grounds* 748 F.2d 69 (2d Cir. 1984). However, from the very beginning of the case, both Pippin, individually, and the County took the position that Pippin was not acting under color of law. Thus, no conflict ever arose and Pippin, individually was not prejudiced when his attorney was directed to represent both his and the County's interests. Thus, even if this Court were to concern itself with error correction, there was no error in with respect to this issue.

3. Petitioner seeks review of the Fifth Circuit's refusal to reverse the judgment against him because of alleged bias by the district court. The petition for certiorari identifies no error in the legal standard applied by the Fifth Circuit and does not claim that that standard is in conflict with any decision of this Court or the other courts of appeals. Petitioner simply asks this court to expend its limited resources correcting alleged errors in the Fifth Circuit's application of the legal standard for bias to the particular facts of this case. It is not the function of this Court to engage in error correction in individual cases. Moreover, no such errors exist on the record of this case -- as the Fifth Circuit noted the court was evenhanded in its questioning and its "comments exhibited at most a sense of humor at a bench trial." Ex. F.

4. Petitioner asks this Court to review the award of attorneys fees and costs to Respondent asserting that Respondent's application for fees did not explicitly address all of the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The Fifth Circuit apparently found this argument so frivolous that it simply affirmed the award without discussing the alleged violations of *Johnson*. The petition for certiorari does not identify any conflict between the courts of appeals regarding the standard for awarding fees and simply asks this Court to substitute its judgment of the proper fee for that of the district court and the court of appeals. Such case specific error correction does not fall within this Court's certiorari jurisdiction.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel of Record for Respondent